TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1954

No. [redacted]

WALLACE BENEDICT, AS RECEIVER IN BANKRUPTCY OF THE HUB CARPET COMPANY, PETITIONER

vs.

AARON RATNER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 04, 1955.

CERTIORARI AND RETURN FILED JUNE 17, 1955.

([redacted])

(28,949)

SUPREME COURT OF THE UNITED STATES.

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vs.

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1 *Petition for Appeal.*

District Court of the United States for the Southern District of New York.

In the Matter of HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER.

Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, who was respondent in the above entitled controversy, arising in the above entitled bankruptcy proceeding, conceiving himself aggrieved by the order and decree made and entered in the above entitled proceeding on the 21st day of November, 1921, directing this respondent to account to the Petitioner Aaron Ratner for all sums received by this respondent as such Receiver upon any accounts contained in any of the lists of accounts transmitted to Aaron Ratner, and that the Bankrupt or its Trustee herein execute a formal assignment for the balance of any and all such accounts up to the extent of the unpaid advances of said Aaron Ratner to the Bankrupt, together with interest thereon from the date of such advances and denying the petition of this Receiver that an order be made herein denying said application of said Aaron Ratner and ordering and directing the said Aaron Ratner to pay this respondent as such Receiver forth-
2 with all the sums so received by said Ratner from the Hub Carpet Company since the 17th day of September, 1921, and all the receivables so turned over to him since that date under the agreement under which said Ratner claimed and that said Ratner be specifically restrained and enjoined from interfering with the Receiver's collection of any of the accounts receivable of the Hub Carpet Company, and from making any further claim under the instrument asserted by him, does hereby appeal from said order and decree of November 21st, 1921, and from each and every part thereof to the United States Circuit Court of Appeals for the Second Circuit for all and several the reasons specified in his assignment of errors which is filed herewith, and said Wallace Benedict as such Receiver prays that this, his appeal, may be allowed, and that citation issue thereon as provided by law, and that a transcript of the record and proceedings and papers upon which said order and decree was made, duly authenticated may be sent to the United States Circuit Court of Appeals for the Second Circuit, and your petitioner further prays that the proper order touching the security required of your petitioner to perfect its said appeal be made.

Dated, November 21st, 1921.

SELDEN BACON,
Solicitor for Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, Respondent and Petitioner for Leave to Appeal.

3 And now, to-wit, this 21st day of November, 1921, upon consideration of the foregoing petition, it is on motion of Seldon Bacon, Solicitor for Wallace Benedict as Receiver in Bankruptcy of Hub Carpet Company, the petitioner for appeal,

Ordered by this Court that the appeal prayed for therein be and the same is hereby allowed and shall operate as a supersedeas upon such petitioners filing a bond in the sum of Five Hundred Dollars with sufficient sureties to be conditioned as required by law.

Dated, November 21st, 1921.

L. HAND,
U. S. District Judge.

(Endorsed:) Filed Nov. 21, 1921. 10 A. M.—U. S. District Court, S. D. of N. Y.

4 *Citation.*

United States of America to Aaron Ratner, Greeting:

You are hereby notified that in a certain controversy arising in the matter of Hub Carpet Company, Bankrupt, and proceeding in equity in the United States District Court in and for the Southern District of New York wherein you, said Aaron Ratner, are complaining petitioner, and wherein Wallace Benedict as Receiver of Hub Carpet Company, Bankrupt, is respondent, an appeal has been allowed to the said respondent therein from the decree therein entered in said District Court of the United States for the Southern District of New York on the 21st day of November, 1921, to the Circuit Court of Appeals for the Second Circuit.

You are hereby cited and admonished to be and appear in said Circuit Court of Appeals at the Federal Court House in the Borough of Manhattan, City of New York, and State of New York, in said Southern District of New York, thirty days after the date of this citation to show cause, if any there be, why the order and decree aforesaid should not be corrected and speedy justice done the parties in that behalf.

Witness the Hon. Learned Hand, Judge of the United States District Court for the Southern District of New York this 21st day of November A. D. 1921.

L. HAND,
U. S. District Judge.

(Endorsed:) Service of a copy of the within citation is hereby admitted this 22nd day of November, 1921. Louis S. Posner, Solicitor for Appellee. Filed Nov. 25, 1921 2:20 P. M. U. S. District Court, S. D. of N. Y.

5 *Order to Show Cause Read in Support of Motion.*

United States District Court, Southern District of New York.

In the Matter of THE HUB CARPET COMPANY, Alleged Bankrupt.

Upon the annexed affidavit of Aaron Ratner, and the exhibit thereto attached, and upon all the papers and proceedings had herein, the Receiver for the above named alleged bankrupt or his attorney, is required to show cause before me or one of the Judges of this Court at a Term to be held in Room 235, Post Office Building, Borough of Manhattan, City of New York, on the 24th day of October, 1921, at 10:30 A. M. in the forenon, or as soon thereafter as counsel can be heard, why an order should not be made herein directing the said alleged bankrupt, the said Receiver, his and its agents, servants and employees, to turn over, endorse and deliver unto the said Aaron Ratner, any and all checks, moneys, notes or payments made on account of or arising from or in connection with the bills and accounts receivable of the above named Hub Carpet Company, alleged bankrupt, until together with the amounts heretofore collected by the said Aaron Ratner, a total of such payments received by him shall amount to Thirty thousand dollars ($30,000)
6 with interest and costs and disbursements, all in accordance with the terms and conditions of the contract between The Hub Carpet Company and Aaron Ratner annexed hereto, dated May 23rd, 1921, and why the said Aaron Ratner should not have such other and further relief as to this Court may seem just.

Service of a copy of this order with the papers hereto attached shall be sufficient if made upon the Receiver herein or upon Seldon Bacon, his attorney, on or before October 20th, 1921, at 2:00 o'clock P. M.

Dated, New York, October 19th, 1921.

LEARNED HAND,
U. S. D. J.

7 *Affidavit of Aaron Ratner Read in Support of Motion.*

United States District Court, Southern District of New York.

In the Matter of THE HUB CARPET COMPANY, Alleged Bankrupt.

STATE OF NEW YORK,
County of New York, ss:

Aaron Ratner, being duly sworn, deposes and says: On or about May 23, 1921, an agreement in writing was duly entered into between The Hub Carpet Company, the above named alleged bankrupt and myself, copy of which is annexed hereto, marked Exhibit I and made part hereof. Following the making of this agreement, I advanced

the sum of Fifteen thousand dollars ($15,000) on the 24th day of May, 1921, and later, and on July 1st, an additional sum of Fifteen thousand dollars ($15,000), making a total of Thirty thousand dollars ($30,000). From time to time as the notes given me for this total of Thirty thousand dollars ($30,000) became due, they were renewed by me. I relying upon the agreement in question and the security afforded thereby, the last notes for such renewal which were given to me being dated, one for $15,000 on July 1, 1921, payable October 1, 1921, and another for $15,000, dated July 24, 1921, due September 24, 1921.

8 On or about May 24th, and monthly thereafter, to and including September 24th, 1921, The Hub Carpet Company delivered to me a statement of its accounts from its books, representing the accounts assigned to me, pursuant to the agreement, and these were collected from time to time by the Hub Carpet Company and retained to its own use, until shortly before the 24th day of September, 1921, when I began receiving checks representing payments of accounts included in the lists delivered to me. The total amount which I have thus collected is the sum of Eleven thousand five hundred and eighty-one and 75/100 ($11,581.75) Dollars, leaving a balance due to me of Eighteen thousand four hundred and eighteen and 25/100 Dollars ($18,418.25), with interest, no part of which has been paid. I also received notes and trade acceptances which have not yet, however, been paid, and which aggregate in face amount the sum of Two thousand two hundred twelve and 66/100 Dollars ($2,212.66).

On or about September 26, 1921, an involuntary petition was filed against the above named Hub Carpet Company, and on or about September 26, 1921, Wallace Benedict, Esq., was appointed Receiver.

My attorney, Louis S. Posner, Esq., of 15 Broad Street, Borough of Manhattan, City of New York, thereupon gave notice to the Receiver by letter dated September 27th, 1921, of my rights in the premises, and demanded that the moneys received on the accounts of the Hub Carpet Company be turned over to me in accordance with the terms of my agreement, which demand however, was refused.

9 Since the petition in bankruptcy was filed herein, I have been examined in behalf of the Receiver under Section 21-a of the Bankruptcy Act before Hon. Harold P. Coffin, Referee in Bankruptcy.

I respectfully ask the Court to direct the Hub Carpet Company and the Receiver, to turn over and account to me for any and all moneys received by it and by him in payments of accounts of customers of The Hub Carpet Company until the total so paid to me shall, with the amount already received by me, amount to the sum of Thirty thousand dollars ($30,000) with interest due as aforesaid.

No previous application for this order has been made.

AARON RATNER.

Sworn to before me this 19th day of October, 1921.
HELEN LEVIN,
Notary Public, Kings County.

Kings County Clerk's No. 162.
Kings Co. Register's No. 2178.
Certificate filed in New York County.
Clerk's No. 462; Register's No. 2367.
Commission expires March 30th, 1922.

10 EXHIBIT I.

This agreement made this 23rd day of May, Nineteen Hundred and Twenty-One, between the Hub Carpet Company, a corporation of the State of New York, party of the first part, and Aaron Ratner, of 1804 Arthur Avenue, New York City, party of the second part, witnesseth:

Whereas, the party of the first part is the owner and is engaged in the wholesale floor covering business at No. 23 West 24th Street, in the City, County and State of New York, and represents to the said party of the second part that it is solvent and has assets over all liabilities amounting to over Sixty Thousand Dollars ($60,000) and that the said party of the first part desires a loan of not exceeding the sum of Thirty Thousand Dollars ($30,000) for the purpose of properly carrying on its business,

And whereas, the party of the second part relying upon the representations herein set forth, has agreed from time to time to make loans to the party of the first part in a sum not exceeding Thirty Thousand Dollars ($30,000), said loans to be evidenced by promissory notes of the party of the first part made to the party of the second part,

Now therefore, know all men by these presents, That we, The Hub Carpet Company, a corporation organized under and by virtue of the Laws of the State of New York, in consideration of the aforesaid agreement and covenant and in consideration of one dollar and other good and valuable consideration to us in hand paid and to us to be paid in the manner hereinbefore set forth, have sold, assigned, transferred and set over and by these presents do sell, assign,

11 transfer and set over unto Aaron Ratner aforesaid, as collateral security for any sum or sums of money that the said Aaron Ratner shall loan to us from time to time in pursuance to the terms of this agreement, all sums of money, accounts and demands due and owing to us on our books of account, and such moneys, accounts and demands that will become due and owing to us, including our books of account which may accrue and become due to us in the future in the ordinary course of business; and we do hereby constitute the said Aaron Ratner our attorney, in our name, and for his own use, to demand, prosecute, sue for, compound, release and discharge the same at his own costs and charges, as fully as if we were present acting therein; and we do hereby ratify and confirm all his lawful acts in the premises.

We, the Hub Carpet Company, further covenant and agree to fully disclose our business and financial conditions at any time the said Aaron Ratner so demands and hereby authorize him to enforce this assignment at any time that in his judgment it may be for his interest to do so notwithstanding the time for the payment of the notes has not in fact accrued.

We further covenant and agree with the said Aaron Ratner on demand to turn over to the said Aaron Ratner any and all payments made to us by our debtors and to be applied by him in payment of any obligations due him, notwithstanding that the time for the payment of said obligations held by him at that time has not in fact become due and payable.

12 In witness whereof, we have hereunto set our hands and seals the day and year first above written in pursuance to a resolution of the Board of Directors of the Hub Carpet Company held on the 23rd day of May, Nineteen Hundred and Twenty-One.

HUB CARPET COMPANY.
By ABNER RATNER,
Vice President.

Signed, sealed and delivered in the presence of
—— ——.

Attest:
EDWARD A. LIFSON,
Secretary.

(Endorsed:) Copy received October 20, 1921 at 11.25 A. M. Selden Bacon, Attorney for receiver. Filed Oct. 24, 1921, 12m. U. S. District Court, S. D. of N. Y.

13 *Affidavit of Wallace Benedict Read in Opposition to Motion.*

United States District Court, Southern District of New York.

In Bankruptcy.

No. 30396.

In the Matter of HUB CARPET COMPANY, Bankrupt.

STATE OF NEW YORK,
County of New York, ss:

Wallace Benedict, being duly sworn, deposes and says that he is the Receiver duly appointed herein by order of this Court on the 26th day of September, 1921, and that he filed his bond as such Receiver duly approved on the same day, and has ever since been and now is the duly appointed, qualified and acting Receiver of said Hub Carpet Company.

Deponent further says that on the 17th day of October, 1921, the above named Bankrupt was adjudged a bankrupt by decree of this court entered on that day.

Deponent further says that he has read the affidavit of Aaron Ratner herein verified the 19th day of October, 1921, annexed to the order to show cause herein why deponent should not be directed by this court to turn over, endorse and deliver to said Aaron Ratner any and all checks, moneys, notes and payments made on account of, or arising from, or in connection with bills and accounts receivable of the Bankrupt until, together with the amounts heretofore collected by said Ratner, the total of $30,000. with
14 interest and costs shall have been received by said Aaron Ratner.

Deponent further says that upon his appointment as such Receiver he went to the store of the above named Bankrupt at No. 23 West 24th Street, New York City, and took possession thereof a little before noon, and that shortly afterwards Abner Ratner, the son of said Aaron Ratner, who was Vice-President of the Hub Carpet Company, and who was there when deponent arrived, and did in deponent's presence hand to deponent's counsel, Selden Bacon, Esq., of New York City, a paper which was a copy of Exhibit I annexed to said affidavit of Aaron Ratner, save and except that the said copy did not contain the following matters appearing on the last page of said Exhibit:

The word "hereunto" on that page was "hereto."

The signature "Abner Ratner" was not thereon, nor was the signature "Edward A. Lifson."

Later about four o'clock in the afternoon of September 26th, said Abner Ratner came into the store with his father, said Aaron Ratner, and deponent together with his said counsel then and there had a conversation with said Aaron Ratner and said Abner Ratner respecting the said instrument. In response to inquiries by Mr. Bacon Mr. Aaron Ratner stated that the original instrument had been delivered to him about the 23rd or 24th of May, 1921; that no list of the accounts or receivables thereby assigned was annexed to the instrument, but that he did shortly afterwards receive a statement of the receivables of the Hub Carpet Company. That none of those receivables were taken over by him at that time, and that he each month thereafter received a statement of the receivables from the Bankrupt showing that they had collected some of the
15 accounts shown on the previous statement and acquired some of the receivables. That he said Aaron Ratner received none of such payments but allowed the Hub Carpet Company to go on using the sums collected on such receivables until the 17th day of September, 1921, and that this was done (and this was stated twice over by Mr Ratner in answer to Mr. Bacon's questions), pursuant to a clear and definite understanding at the time of the execution of said Exhibit I that the Bankrupt Company should be allowed to use the receivables until Mr. Ratner became disturbed about his recovering his claim, and when he made any demand the receivables should be turned over to him. That he made no such

demand until the 17th of September, 1921, after which he had so taken over between $13,000 and $14,000.

Deponent further says that on the minute book of the corporation deponent has found minutes of a meeting purporting to have been held on the 23rd day of May, 1921, of which minutes a true and correct copy is hereto annexed, marked Exhibit A and hereby made a part of this affidavit.

Deponent further says that on the ledger of said Hub Carpet Company appears an account of the sums so collected and turned over to said Aaron Ratner after September 17, 1921; such items are set forth in Exhibit D, hereto annexed.

Deponent further says that it is ascertained from the books and papers of the Company and from statements made by the officers of the Company, namely, Abner Ratner, the Vice-President, Edward A. Lifson, the Secretary, and Irving Fieldman, Treasurer of the Bankrupt, and deponent believes, that the stock of the Company was owned by Albert Lifson who was President of the Company, his son, Edward A. Lifson, and his two sons-in-law,
16 said Abner Ratner and Irving Fieldman. That the great bulk of the indebtedness of the Bankrupt for merchandise was incurred on the strength of a statement of its assets and liabilities on the 31st day of December, 1920.

Immediately after the date of said statement on the 3rd day of January, 1921, a meeting was held of the directors at which a resolution was passed and contained in the minutes of the said meeting, of which a copy is annexed to this affidavit marked Exhibit B and hereby made a part hereof. That subsequently the sums of $5,200., $3,700. and $5,420. were credited respectively to said Edward A. Lifson, said Abner Ratner and said Irving Fieldman, to wit, at the following dates; the sum of $5,200. to said Edward A. Lifson under date of the 1st day of August 1921, the sum of $3,700. to Abner Ratner under date of the 1st day of August 1921, and the sum of $5,420. to Irving Fieldman under date of the 1st day of August 1921. That each and all said sums were at that time charged to the general expense account of the corporation, and thereafter payments were made by the corporation to said Edward A. Lifson, Abner Ratner and Irving Fieldman on account of said respective sums.

Deponent further says that on the 12th day of September, 1921, a meeting of the directors of said corporation was held, and a copy of the minutes of that meeting is hereto annexed marked Exhibit C. That pursuant to that resolution on the 15th day of September, 1921, a mortgage was executed by the above named Bankrupt to V. E. Husbands for $10,000. through the firm of Stamler & Stamler, attorneys-at-law of Elizabeth, New Jersey. That said Stamler &
Stamler deducted $1,000. from the amount of the loan for
17 their services and disbursements in securing the loan and also deducted $2,000. in settlement of an old bill claimed by them against the predecessor company of the Bankrupt, which bill had been standing for a number of years, and remitted the $7,000. balance of the proceeds to the Bankupt. That there were

taxes due on the mortgaged property (this mortgage was a third mortgage) amounting to a little over $4,000. which the Bankrupt thereafter paid out of the proceeds of said loan, and such $7,000. was received by the Bankrupt from said Stamler & Stamler on the 16th day of September, 1921, and on the 17th day of September, 1921, the said Aaron Ratner demanded of the Bankrupt all its receivables. On the 22nd or 23rd day of September, 1921, the Bankrupt by its said officers, Edward A. Lifson, Abner Ratner and Irving Fieldman withdrew from its bank deposit into which it had merged the $7,000. check, the sum of $3,000. which was divided forthwith between said Abner Ratner, said Edward A. Lifson and said Irving Fieldman, $1,000. to each, being applied by them respectively against the balance of indebtedness in their favor created by the credits above mentioned.

Deponent further says that at the beginning of September, 1921, the said Bankrupt was indebted on a note for $20,000 at the Bank of Manhattan Company, which note was endorsed by the said Albert Lifson, and that said note was paid off by the Bankrupt after default in paying indebtedness to outside creditors had been made, whereby said Albert Lifson was discharged from liability on said $20,000. note.

Deponent further says that also subsequent to the first day of September, 1921, said Bankrupt paid to said Albert Lifson a
18 sum in excess of $9,000. on account of indebtedness claimed to be due him.

The Bankrupt, therefore, has, as deponent is informed and believes, been actively engaged in preferring each of its officers and the father of its said Vice-President, Abner Ratner, the petitioner Aaron Ratner.

Deponent further says that prior to the demand by the said Aaron Ratner that the Bankrupt turn over to him its receivables, various creditors of the Bankrupt were pressing it for statements of its condition, and for payment, all of which was well known to the officers of that Company and, as deponent believes, to said Aaron Ratner. That the creditors so pressing the Bankrupt and inquiring into its affairs included W. & J. Sloane, George Nicols & Co., E. W. Poulson & Co. Inc. and Cook's Linoleum Company, whose claims aggregate about one-half or more of the total indebtedness of said Bankrupt, and that a considerable part of the claim of said Cook's Linoleum Company, which was for $37,317.39 had been overdue since the tenth day of September, 1921.

Deponent further says that the said sums of $3,700., $5,200. and $5,420. so claimed by the said Abner Ratner, Edward A. Lifson and Irving Fieldman at the directors' meeting of January 3rd, 1921, and subsequently credited to them were not claimed to be disbursements incurred for the Bankrupt corporation but for predecessor corporations or for services rendered such predecessor corporations. The Bankrupt corporation was organized only in November, 1920, and took over the said business on the 31st day of December 1920.

Deponent further says that among the acceptances and notes taken over by said Aaron Ratner was one for $1,000 from
19 one Sam Herzfeld who is ready and willing to pay the same, but deponent has forbidden his paying the same to the said Aaron Ratner, and the said Aaron Ratner declines to surrender said note to this deponent, and deponent cannot secure the payment of said note or of any of the other of said notes or acceptances held by said Ratner until they are delivered to deponent.

Deponent further says that between the 24th day of May, 1921, and the 15th day of September, 1921, said Hub Carpet Company made collections on its various accounts and notes receivable in excess of $150,000, as shown by its books.

And deponent as such Receiver prays that an order be herein made denying the application of said Aaron Ratner and ordering and directing the said Aaron Ratner to pay to said deponent forthwith all the sums so received by said Ratner from the Hub Carpet Company since the 17th of September, 1921, and all the receivables so turned over to him since that date under his said alleged agreement, and that said Aaron Ratner be specifically restrained and enjoined from interfering with deponent's collection of any of the accounts receivable of the Hub Carpet Company, and from making any further claim under his said pretended assignment, and such relief deponent prays upon this his affidavit and the annexed affidavit of Seldon Bacon.

WALLACE BENEDICT.

Subscribed and sworn to before me this 22nd day of October, 1921.

[SEAL.] O. V. W. HAWKINS,
Notary Public, Nassau Co., New York.

Certificate filed in N. Y. Co. No. 4.
N. Y. Co. Register's No. 2002.

20 EXHIBIT A.

Meeting of the Board of Directors Held on the 23rd Day of May, 1921, at the Office of the Company.

All the Directors were present. The minutes of the last meeting were read and approved.

Mr. Irving Fieldman, Treasurer of the Company, reported that he had a talk with Mr. Hayes of W. & J. Sloane Company who suggested that it would be advisable and for the best interest of the company to procure additional sums of money with which to run the business, and that thereupon he through Abner Ratner arranged with Mr. Aaron Ratner of New York City, to borrow from him the sum not exceeding Thirty Thousand ($30,000.00) Dollars, upon the *notice* of the company and the same to be secured by accounts receivable of the company that are now in existence or that in the future may accrue in the ordinary course of business.

After a lengthy discussion, the Officers were authorized to enter into a negotiation and written contract to borrow from Aaron Ratner, the sum not exceeding Thirty Thousand ($30,000) Dollars on the notes of the company, as security to deliver an assignment to the said Aaron Ratner of the books of account of the company, as per the report of Mr. Fieldman, and the Officers of the Company were authorized to execute notes in sums not exceeding Thirty Thousand ($30,000.00) Dollars and also execute an assignment of the books of account of the company as explained by Mr. Fieldman.

Upon motion duly made and seconded meeting adjourned.

EDWARD A. LIFSON,
Secretary.

21 EXHIBIT B.

Meeting of the Board of Directors Held on the Third Day of January, 1921, at the Office of the Company.

The following business was transacted. All the Directors were present and Albert Lifson presided. The Treasurer of the Company read the annual report of the company and the same was ordered filed.

On Motion of Mr. Edward Lifson the following salaries were confirmed for the year 1920. Albert Lifson $15,000.00; Irving Fieldman $7,800.00; Abner Ratner $7,800.00; Edward Lifson $7,800.00.

Mr. Fieldman presented a Bill for disbursements in connection with the management of the business amounting — $5,420.00 the same was referred to the President for examination before direction for the payment of the same is made, and if found to be correct the same shall be paid or credited to the account of Mr. Fieldman. Mr. Ratner presented a bill for disbursements amounting to $3,700.00 and the same course was taken. Mr. Edward Lifson presented a claim against the company for additional services &c., amounting to $5,-200.00 and the same was referred in the same manner as the claim of Mr. Fieldman.

The Treasurer reported that the profits for the year 1920 after paying expenses, excepting the claims above set forth amounted to $8,040.97.

On Motion duly made and seconded the salaries of the officers for the year 1921 were fixed as follows: Albert Lifson $15,000.00 per annum; Irving Fieldman, $10,400.00 per annum, Abner Ratner $10,400.00 per annum and Edward Lifson $10,400.00 per annum, same to be paid in monthly instalments or the monthly salaries to be credited to their respective accounts.

Upon Motion duly made and seconded meeting adjourned.

EDWARD A. LIFSON,
Secretary.

22 EXHIBIT C.

Meeting of the Board of Directors Held on the 12th Day of September, 1921, at the Office of the Company.

All the Directors were present, excepting Mr. Albert Lifson. The minutes of the last meeting were read and approved.

Mr. Irving Fieldman reported that he had made arrangement with the firm of Stamler and Stamler, Attorneys, to borrow from his client, the sum of Ten Thousand ($10,000.00) Dollars on the bond and mortgage of the company covering the property on Market Street, Philadelphia, Pa., which moneys would be absolutely necessary for the purpose of meeting existing obligations. The officers of the company were authorized to execute a bond and mortgage.

On motion duly made and seconded meeting adjourned.

EDWARD A. LIFSON,
Secretary.

EXHIBIT D.

The following is a copy of the ledger entries on books of the Hub Carpet Co. checks, trade-acceptances and notes turned over to Aaron Ratner from September 17th, 1921 to September 26th, 1921 inclusive.

September	19, 1921	.....	$1,364.98
	20,	.....	2,764.68
	21,	.....	506.70
	22,	.....	930.31
	22,	.....	50.00
	22,	.....	56.50
23	22,	.....	777.87
	23,	.....	2,746.58
	21,	.....	133.71
	21,	.....	82.50
	22,	.....	1,000.00
	23,	.....	200.00
	23,	.....	200.00
	23,	.....	492.08
	24,	.....	1,146.96
	24,	.....	197.62
	26,	.....	1,065.30
	26,	.....	157.92
	26,	.....	80.16
			$13,953.27

Of the above items the following were trade acceptances or notes as indicated of the several customers of the Hub Carpet Co.

September 21, 1921,	Note	$133.71
21,	Note	82.50
22,	Note	1,000.00
23,	Note	200.00
23,	Note	200.00
23,	Note	492.08
26,	Trade Accept.	157.92
26,	Trade Accept.	80.16
		$2,346.37

The other items were checks.

24 *Affidavit of Selden Bacon Read in Opposition to Motion.*

United States District Court, Southern District of New York.

In Bankruptcy.

No. 30396.

In the Matter of HUB CARPET COMPANY, Bankrupt.

STATE OF NEW YORK,
County of New York, ss:

Selden Bacon, being first duly sworn, deposes and says that he is the attorney for the Receiver herein, and a member of the firm of Duer, Strong & Whitehead, attorneys for petitioning creditors.

Deponent further says that under an order, pursuant to the provisions of Section 21-A of the Bankruptcy Act deponent has examined numerous witnesses, including Valeria E. Husbands, alleged mortgagee of the Bankrupt, Charles J. Stamler and John J. Stamler, the members of the firm of Stamler & Stamler, attorneys-at-law of Elizabeth, New Jersey, Irving Fieldman, Treasurer of the Bankrupt, Abner Ratner, the Vice-President of the Bankrupt, Edward A. Lifson, Secretary of the Bankrupt, and Aaron Ratner, the father of said Abner Ratner, who has procured on order that the Receiver herein show cause before this Court on October 24th, 1921, why the said Receiver should not be directed to turn over all the moneys collected by him on receivables of the Bankrupt to said Aaron Ratner to satisfy a claim of his for $30,000 with interest and costs.

25 Deponent has read the annexed affidavit of Wallace Benedict, the Receiver herein, and confirms fully the statements of said Benedict as to the interview with said Aaron Ratner and Abner Ratner on the 26th day of September, 1921. Said Aaron stated to deponent twice over that the instrument under which he claimed, of which Exhibit I of his affidavit is practically an exact

copy, had been given to him and received with the express understanding that the Bankrupt Company should be allowed to continue to collect its receivables and use the collections in the ordinary course of its business, but that in case said Aaron Ratner concluded at any time that he was insecure he might demand that the receivables be turned over to him, but until then the Company should enjoy and use the same. That no list of the accounts receivable assigned to him was appended to the instrument, but that at about that day a statement was rendered to said Aaron Ratner of the then receivables, and later each month he received a similar statement. That said statements from time to time showed changes in the receivables. Various sums had been collected, none of which had been turned over to said Aaron Ratner, and that other accounts receivable had grown up, and that said Aaron Ratner was perfectly aware that the Bankrupt was using the proceeds of the receivables as collected in its business, and that that was according to the terms of the express understanding at the time the instrument was executed, and the son, Abner Ratner, who was standing by, stated "Yes, that was the clear understanding at the time the paper was executed."

26 Deponent further says that in the examination of Mrs. Husbands she disclosed that she was simply a dummy in the mortgage and had absolutely no interest therein; that she was a clerk in the office of Stamler & Stamler and the mortgage was really taken for a client of theirs, Mr. Henry Piper, who had not been advised of this loan of his money. That he kept about $50,000 all the time which they had authority to lend out on mortgage.

Mr. Charles J. Stamler claimed to know nothing of any of the transactions of his firm with the Bankrupt or anything about the said mortgage.

Mr. John J. Stamler testified that really the loan was not for account of Mr. Piper; that his firm borrowed $50,000 from Mr. Piper with the understanding that they were responsible to Mr. Piper for the return of the loan, and that in substance they had undertaken to use the loan in making various investments, but that the loan was really theirs and not Mr. Piper's. His firm acted as attorneys for the Bankrupt Company from the date of a conversation over the telephone between him and Mr. Edwin Heyes, credit-man of W. & J. Sloane, where Irving Fieldman had referred Mr. Heyes to said Stamler & Stamler. Such conversation as deponent is informed by Mr. Heyes and believes took place on the 16th day of September, 1921. Mr. Stamler asserted that his firm had not previously to that conversation acted as attorneys for the present Hub Carpet Company, but only as procurers of the $10,000 loan for it, which was really loaned by themselves.

Deponent further says that Mr. Irving Fieldman was examined at length and that he stated that the sum of $5,420 claimed by him, mentioned in the resolution of the directors of January 3rd,

27 1921, represented disbursements made by him in connection with the business of the predecessor corporation, the Hub Carpet Company of Pennsylvania, and that the same was true with

regard to the claim of Mr. Abner Ratner for $3,700 and with regard to the claim of Mr. Edward A. Lifson for $5,200.

Mr. Fieldman further stated that the bill of Stamler & Stamler, which was settled at $2,000, which amount they deducted from the $10,000 loan, was a charge for services rendered the former corporation, and this was confirmed by Mr. John J. Stamler.

Said Irving Fieldman, said Abner Ratner and said Edward A. Lifson each admitted on such examinations that they took $1,000 apiece from the corporate treasury about the 22nd or 23rd day of September, 1921, the amount being withdrawn from its bank accounts, the same being distributed equally between Mr. Edward A. Lifson, Mr. Ratner and Mr. Fieldman.

Said Irving Fieldman further testified as follows in answer to questions put by this deponent:

"Q. Along in May the company executed a paper running to Mr. Aaron Ratner purporting to be an assignment of accounts receivable, did it not?

A. That is right. That was principally arranged between Abner Ratner and his father although the entire—I knew all about it, but anything in connection with Mr. Aaron Ratner was usually taken up with his son.

Q. That is a matter referred to in the minutes of the meeting of the board of directors held on May 23rd?

A. That is right.

28 Q. Was there any discussion at that meeting of directors or between any of you three or four officers at or about that time concerning the matter of this assignment of accounts?

A. There was.

Q. Was there anything said about continuing to collect the accounts?

A. Absolutely.

Q. What?

A. When Mr. Abner Ratner suggested that his father would like to have an assignment of the accounts as I recall it I asked him why, and he explained to me that inasmuch as Mr. Aaron Ratner, his father, had money with us from time to time and we had not reduced those obligations it was becoming more or less a permanent capital and that since his father had a certain sum of money and had no business whatsoever he depended upon the interest coming from that money and the safety of the principal in order to be assured of his interest, and the father would rest easier if he had such an assignment and we agreed to give it to him.

Q. What was said about your continuing to collect the receivables?

A. Why, the first question I asked was whether Mr. Ratner would have anything to do or would insist upon getting the money as it came into our hands, and he said, no, that we could receive the collections in the usual way, it did not make any difference to Mr. Ratner, he simply wanted assurance of his principal, that is all, inasmuch as we were using his money practically permanently for quite some time as designated on our books.

Q. You say who said this, "he"?

A. His son.

29 Q. Abner Ratner?

A. Abner Ratner.

Q. Did you have any talk with Mr. Aaron Ratner himself?

A. No, none whatsoever.

Q. About that matter?

A. No, that was all reported to him by his son.

Q. Was there annexed to that assignment any list of your receivables at that time?

A. If I recall, I am not quite certain, it was the custom of his son to give him a list of all accounts receivable, practically monthly, and as I understand it Mr. Aaron Ratner wanted that to know how our accounts changed monthly.

Q. Did you turn over to him any of the sums collected on your accounts receivable at any time before the 5th of September?

A. None whatsover.

Q. 1921?

A. 1921.

Q. And do you know whether the payments* of the accounts of your receivables were sent to the father, Aaron Ratner, from month to month?

A. I cannot say positively because that was entirely a matter between father and son. It was just an incident.

Q. You know simply that they were prepared?

A. I am quite positive that his son was to do that, meet his father's wishes along that line.

Q. You know such statements were prepared.

A. I think they were.

Q. Don't you know whether they were or not?

A. I will not say absolutely positively.

Q. Did not you ever see any?

A. I believe I saw, I am not positive.

30 Q. You continued after the execution of the paper to collect your receivables just as before?

A. Yes, that is right.

Q. And you used the proceeds in your business?

A. Yes.

Q. As you saw fit?

A. Yes.

Q. And Mr. Aaron Ratner never made any objection to that?

A. None whatsoever.

Q. Nor his son?

A. No.

* * * * * * *

Q. Was there anything definitely said at the time this paper was given as to whether you would continue to use the proceeds of the receivables as they came into the business?

*Note: So in Stenographer's Minutes the word should be statements."

A. Mr. Bacon, I cannot recall exactly the conversation but the assignment in itself will tell you exactly what Mr. Aaron Ratner had in mind. If I remember, it was not a question of what was said, it was a question of what was actually put down on paper.

Q. I have a paper which purports to be a copy of that paper. What I am getting at is, was there anything said in addition about that?

A. Oh, there may have been but it is so far past, it seemed so unimportant at the time, that I do not recall.

Q. It would not have been unimportant if you were giving up all of your receivables, would it?

A. It was not important to us because we knew our position was very safe, it was simply a question of Mr. Aaron Ratner's mind being easy as to the principal, a matter of form perhaps entirely so that he would be assured in case anything did happen and as a business man I thought he figured it that way, that his principal would be safe.

31 Q. You say you did not consider you were giving up all your receivables at that time and turning them over to Aaron Ratner?

A. I knew that we were giving him an assignment to cover his principal.

Q. That is not my question, did you contemplate at that time that you were turning over to him all the moneys, that you would turn over to him all the moneys that came in?

A. No, sir, we were to receive the collections in the usual way.

Q. And keep them?

A. And keep them and make disbursements accordingly.

Q. Did either Mr. Ratner make that statement to you?

A. I do not recall it.

Q. Was there anything of that kind discussed at that meeting?

A. The time is so long ago that I would not say with definiteness as to what was said, everything that was contemplated was put down in black and white at the time and the matter gone over carefully.

Mr. Bacon: I ask this paper be marked for identification.

Paper marked receiver's exhibit "2" for identification October 13th, 1921.

Q. I call your attention to this paper which has been marked receiver's exhibit "2" for identification. Were you present on the 26th of September, 1921, at the office of the Hub Carpet Company when that paper was handed to * young Mr. Ratner?

A. I think I was.

32 Q. And is that a copy, do you know whether that is a copy of the paper that was executed pursuant to the resolution of May 23d?

A. I could not tell you. I have not read it over nor do I remember the exact contents of the original.

*The words "me by" have been omitted by the stenographer in the minutes.

Q. Do you remember Mr. Ratner giving that to me?

A. I think I overheard a conversation between you and Mr. Ratner.

Q. I call your attention to the paragraph at the foot of the second page of that document. Did Mr. Ratner senior ever make any demand in accordance with that provision before the 15th of September?

A. Before the 15th, I do not think so. I am not saying absolutely positive because there is nothing in my mind that would make September 15th stand out clearly so that I can say positively yes or no.

Q. I call your attention to this account, this is your ledger, is it not?

A. Yes, and I can recognize it and tell you all agout it.

Q. There is an account here headed "Aaron Ratner security for notes"?

A. Yes.

Q. The first item on that is September 19th, 1921 credit by check folio 31 $1,364.98?

A. Yes, that is right.

Q. And that is followed by numerous items each day up to the 26th of September?

A. That is correct.

Q. Were those sums all paid over to Mr. Ratner?

A. They were.

Q. That is Mr. Ratner senior?

A. Mr. Ratner senior.

Q. How were they, in the form of checks?

A. In the form of the original checks as received from the
33 various debtors of our company.

Q. Does that first item of September 19th enable you to say whether or not any demand had been made by Mr. Aaron Ratner?

A. Very clearly. I can tell you the circumstances surrounding it.

Q. All right, if you will?

A. I do not know what date September 19th was but if it was a Saturday I can tell you.

Q. September 19th was Monday?

A. It was on a Monday, before that Saturday, the 17th of September, I can recall now, I can tell you positive it was the 17th of September Mr. Aaron Ratner was in our office, and I know that Abner Ratner had a conversation with him and I afterwards learned in that conversation *be* expressed——

Q. You say you learned, from whom?

A. From Abner Ratner, he expressed himself that our company most unfortunately was being interviewed I might say by our various creditors in connection with some money and particularly one firm, Cook's Linoleum Company, that was past due, and it was along that time that there were various creditors' meetings, if I recall, also a meeting with Mr. Stamler, which in the eyes of Abner Ratner designated the fact that we were in financial difficulties and he so

told his father and immediately upon that interview his father came to us, Abner Ratner and myself and others, that in conformity with his assignment which he held he would like us to turn over from that time all moneys that came into the Hub Carpet Company office.

34 Q. That was on the 17th?

A. That was on the 17th, and that was Saturday, and I believe our deposit had already been sent to Philadelphia, we banked all in the Central Trust & Savings Company and we could not turn that money in that day so we promised him that beginning with Monday's collections we would turn over such collections as came in, that were in connection with the accounts receivable of course.

Q. Did you have any talk with Mr. Aaron Ratner yourself on that day?

A. No, I did not, it was between father and son.

Q. The son reported this to you?

A. Well, but I knew of the demand personally by Mr. Aaron Ratner.

Q. That is what I am asking you, did he make that demand?

A. Yes, in front of his son and myself.

Q. Did he make this statement to you, you have just given us?

A. Yes, to me and Mr. Abner Ratner sitting opposite my desk."

Said Abner Ratner further testified as to the instrument Exhibit I of the affidavit of said Aaron Ratner, and the time of its execution, as follows:

Q. There was then a considerable note due at that time already?

A. Yes.

Q. There was not a new advance of $30,000 at that time?

A. Well, yes, there was, in this way, that we paid up, I am not sure I am correct, but if I remember rightly we paid off what we owed him, that is, on that day; the day that was made, or the following day, and made out a new note.

35 Q. But that new note represented practically the old indebtedness and some more?

A. No, it did not. My figures may be wrong. I think in May we owed my father $15,000, if I remember rightly. When he came in a day or two before it was due I asked him if he would renew it, so he asked me whether we wanted it, what we intended to do with his loans, whether we intended to use them permanently or not. I told him that if possible we could use them more or less permanently, and he said that in view of the market conditions at that time he would be willing to let us have the use of his money if we would secure him by the accounts, and we worked out the best way to secure him without affecting us personally, that is, by not having him collect accounts or anything of that sort, it would be by means of that assignment; so I think we worked it out that way and when his loan became due, which was a day or two later than the day of this assignment, why, we paid that by giving him a new note for the amount and the difference up to $30,000 he was to let us have when we needed it.

Q. And did you afterwards get from him the balance of the $30,000?

A. Yes.

Q. And that was along during June, July and August?

A. Sometime along there.

Q. Does that appear in the ledger anywhere, those further advances?

A. Why, I do not see it on his account. You see for all loans he made us we gave him notes and all the records of our notes payable were kept by Mr. Fieldman.

36 Q. You did not give him the $30,000 note right there and then?

A. No, I think there were two notes, one note in May and one later.

Q. At the time that paper was executed, or before that paper was executed, did you have some discussion among the directors at this meeting about that transaction?

A. Yes, I called their attention to the fact we had——

Q. Who do you mean by "their"?

A. Mr. Fieldman, primarily, and I think I mentioned it to Mr. Lifson.

Q. That is Edward Lifson?

A. Yes, after we had borrowed money off and on from my father and within the past year it had been renewed pretty regularly and I told them I thought if we were going to use it more or less as a permanent loan it would only be right to secure my father in any way possible, and since he wanted that security before he would let us continue renewing those obligations we decided to give him this assignment.

Q. Was anything said about the subject of what should be done at the time with collections as they came in?

A. With our collections, you mean?

Q. Yes?

A. We mentioned it but we told him that we would not under any conditions have him make our collections for us, do you see, and one of the stipulations was that we were to collect them and if at any time should he feel that our financial condition was not absolutely safe he could immediately demand that he become the collector.

37 Q. What was to be done with the sums that you collected, was anything said about that?

A. Nothing at all.

Q. Were you to turn them over to him or use them?

A. No, we were to go on and use them. In other words the security to be turned over to him when he demanded it. In the meantime he held security, he held those accounts, that is, they had been assigned to him.

Q. At the time that paper was executed was any list of the receivables made up for him?

A. Yes.

Q. Was it attached to the paper?

A. It was given to him with the paper, I do not know whether it was attached to it.

Q. Were subsequent statements of receivables given him?

A. Yes, every month.

Q. Were those detailed statements, giving the names of the debtors?

A. The names of the debtors, the amount and the city.

Q. And that was done practically the first every month?

A. No, I think it was done around the 20th, the date of this. You see we gave him the first statement on the 23rd of May and the 23rd of every month thereafter.

Q. Just a month apart. So that there would have been one on the 23rd of June and one on or about the 23rd of July?

A. They may have varied a day or two. In other words he wanted to be sure that the amount of our accounts receivable covered the amount, of our accounts receivable covered the amount, more than covered the amount of his loan.

38 Q. And you did not at any time after the execution of this paper up to after the 15th of September make him any payments did you?

A. Not up to, no.

Q. What happened to the interest on his notes?

A. We paid that.

Q. You paid the interest?

A. Yes.

Q. But you did not in that time up until the 19th of September?

A. I think that is the day, I know it was the week preceding the time Mr. Benedict took possession.

Q. He came in Monday, the 26th?

A. Then it was the 19th.

Q. And up to that time all the sums that you received on receivables had gone right into the general fund?

A. Yes.

Q. And had been used by the Hub Carpet Company?

A. Yes.

Q. And did Mr. Aaron Ratner make any objection to that at any time?

A. No.

Q. And these statements sent to him from month to month disclosed that amounts had been collected and new accounts incurred?

A. Well, naturally there were some accounts would appear on one month's statement that had not been on the preceding, and so forth.

Q. And other accounts that appeared on the preceding statement that had been paid off?

A. Yes.

Q. Who had the talks with your father on behalf of the Company?

A. I did.

Q. Did you explain to him back there in May anything about this arrangement about the maturing accounts?

A. No, nothing definitely was said about that. In fact, you
39 see, Mr. Bacon, this was not a question where we had gone to a stranger to borrow money and where everything would be definitely put down the way it would be if we actually sold our account to a regular house who made a business of that. He simply wanted security if we wanted to use his money more or less permanently and although we did not go into the legal aspects of it we felt sure that this paper would cover him and would not affect us in any way detrimentally.

Q. You had some talk with him at that time about your continuing to collect the accounts?

A. No, nothing definite was mentioned except the understanding was that we were to go on the same way and if at any time he felt shaky about our financial responsibility he could immediately demand that we pay.

Q. In the meantime you were to collect them and use them?

A. Nothing definite said but that was the understanding.

Q. That was the understanding?

A. Yes.

Q. And he so stated to Mr. Benedict and myself on the 26th of September in your presence, didn't he?

A. I do not remember, he may have.

Q. Did not he make that statement, and you say, "Yes, that was the clear understanding"?

A. I do not remember whether those were my words but I do know that the understanding was that we were to go ahead with the collections.

Q. And the use of the money?

A. Naturally.

* * * * * * *

40 Q. All those payments that are represented by that entry you simply transferred the checks as they came in?

A. Yes, checks and notes.

Q. You did not deposit the checks to your own account and give your check?

A. No, they were simply endorsed over.

Q. Were there any notes among them?

A. Yes, all collections were turned over to him."

Said Edward A. Lifson was also examined by deponent with regard to the instrument, Exhibit I of the affidavit of said Aaron Ratner, and testified as follows:

"Q. What is your recollection about this transaction with Mr. Aaron Ratner in May?

A. The only thing I know about it is that I knew Mr. Ratner was negotiating with his father to secure us a loan but I knew nothing of the assignment until it was shown to me for my signature to put on as witness. At that time I read it through and witnessed the signature.

Q. You were at the meeting of directors when it was discussed, weren't you?

A. Well, of course the discussion, I knew about it, naturally I took the minutes but I knew about Mr. Ratner was negotiating for a loan.

Q. Was there any discussion there about whether you should continue to collect your receivables and use them until called for by him?

A. No.

Q. You do not recall any?

A. I do not recall any.

41 Q. However, you did continue to take the receivables as they came in in spite of the assignment?

A. All moneys were taken in in the usual way as if there was no assignment.

Q. And used right in the business of the Company?

A. Used in the business of the Company.

Q. And you understood that that was proper for you to do?

A. What?

Q. That that was the understanding with Mr. Ratner, Sr., that you should do that?

A. That we should collect the funds?

Q. Yes?

A. Yes.

Q. And use them right in your business just as above?

A. Yes.

Q. Until he called for them?

A. Yes.

Q. And he did not call upon you until the 17th of September?

A. Not that I know of.

Q. On the minutes of the meeting of January 3rd, 1921, appear three items of claims charged, one in your favor, one in favor of Mr. Abner Ratner and one in favor of Mr. Fieldman respectively $5,420, for Mr. Fieldman, $3,700 for Mr. Ratner and $5,200 to you except that in the case of Mr. Fieldman it is stated that it was a bill for disbursements and likewise in the case of Mr. Ratner, but in your case it is stated to have been a bill for additional services. What was the nature of that claim of yours for $5,200?

A. That was for moneys personally expended by me since the organization of the company.

Q. Of the old Company?

A. Of the old Company, for additional travelling expenses, entertaining expenses of buyers and so forth, which had never been drawn by me from the Company.

42 Q. And none of these three items of liabilities appear in your balance sheet of December 31st?

A. I could not say. I have no recollection of the figures.

Q. This is a resolution of January 3rd, 1921?

A. Yes.

Q. How could they appear in your books of December 31st, 1920?

A. I say I do not remember, I cannot remember the balance sheet in detail, but the supposition is that they did not appear.

Q. Then as I understand you you think that this statement in

your case that it was for additional services is a mistake. The others read disbursements, yours read for services?

A. I do not know. As far as the wording is concerned, why, the charge would be the same in each case, it was not exactly additional services, it was disbursements, plus additional services.

Q. There was a charge for services in this?

A. A charge for additional services.

Q. Is that true in each case?

A. Yes, I should say yes.

Q. And the $3,000 that you took from the Central Trust & Savings you took that knowing that the creditors were discussing the question of Receivership?

A. Yes.

Q. And simply handed $1,000 to Mr. Ratner and $1,000 to Mr. Fieldman and took $1,000 yourself?

A. Yes.

Q. And credited that up against the accounts that you each had?

A. Against our accounts."

43 Deponent further says that he has examined said claimant Aaron Ratner, pursuant to said order, and hereto annexed marked Exhibit E is a copy of the testimony of said Aaron Ratner so given on the 14th day of October, 1921, which is hereby made a part of this affidavit.

Deponent further says that all the foregoing mentioned testimony is copied from the stenographer's minutes.

Deponent further says that Exhibit No. 2 for identification on the examination of said witness under Section 21-A is the copy of the instrument Exhibit I of said Aaron Ratner's affidavit delivered to deponent on the 26th of September, 1921, but varies therefrom in that the word "hereunto" is "hereto" in the said Exhibit 2 for identification, and that in said Exhibit 2 for identification the signatures "Abner Ratner" and "Edward A. Lifson" do not appear.

SELDON BACON.

Subscribed and sworn to before me this 24th day of October, 1921.

[SEAL.] O. V. W. HAWKINS,

Notary Public, Nassau Co., New York.

Certificate filed in N. Y. Co. No. 4.

N. Y. Co. Register's No. 2002.

44 EXHIBIT E.

United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of HUB CARPET COMPANY, Bankrupt.

Before Harold P. Coffin, Esq., Referee in Bankruptcy, 217 Broadway.

New York, October 14, 1921—10 a. m.

Hearing under Section 21-*a*.

Proceeded pursuant to adjournment.

Appearance-:

Mr. Selden Bacon,
Attorney for receiver.
Mr. Wallace Benedict,
The receiver.
Mr. Louis S. Posner,
Attorney for Aaron Ratner.

45 AARON RATNER, called as a witness on behalf of the receiver and being duly sworn testified as follows:

Direct examination.

By Mr. Bacon:

Q. Mr. Ratner, you reside where?
A. 1804 Arthur Avenue.
Q. In the Bronx?
A. Bronx, yes.
Q. And you are the father of Abner Ratner who is one of the officers of the Hub Carpet Company?
A. Yes.
Q. Vice-president, I think he is?
A. Yes.
Q. And are you familiar with the fact that there have been two or three corporations of the same name?
A. I am not. I only know of one Hub Carpet Company.
Q. They did business in Philadelphia for a while, did they not?
A. The same name.
Q. The same name but was not that a different company? Was not that a Pennsylvania corporation?
A. I do not know the details of it. They are always called the Hub Carpet Company.

Q. Had you prior to January 1st, 1921 lent the Hub Carpet Company any money?

A. Yes.

Q. How much?

A. $20,000. That was the last time. Four years ago I also loaned them money but there was a period of four years I did not give them any money.

Q. But before the 1st of January you had loaned them $20,000?

A. Yes, in December 24th, 1920.

Q. Was that paid up?

A. Yes, that was paid up.

Q. When?

A. It was a note for three months that was due December 24th. On December 24th they gave me $2,500 on account and the interest and they renewed it again for three months.

46 Q. That is renewed the balance?

A. The balance, yes.

Q. That would bring it to March 24th?

A. To March 24th, 1921. On March 24th they paid me off the entire amount and they borrowed again $15,000.

Q. On March 24th?

A. On March 24th.

Q. For how long?

A. For two months.

Q. I call your attention to this paper marked Exhibit "2" for identification, that is, is it not, an exact copy of the instrument which you have this morning produced with the exception that the instrument produced by you bears the seal of the Hub Carpet Company and the signature of Abner Ratner as vice-president and of Edward A. Lifson secretary?

A. I understand that this is a carbon copy of the original paper.

Q. You have just heard this paper read?

A. Yes.

Q. And you know it is correct, with those exceptions?

A. Yes.

Q. When did you get this paper?

A. I got this paper the 23d of May, that was before the note was renewed, the 24th it was due, and at the time it was renewed this paper was given to me.

Q. Did you have any conversation with any of the officers of the Hub Carpet Company prior to the giving of this paper?

A. Yes.

Q. With whom?

A. Well, particularly I was talking with my son.

Q. Did you talk to any of the others?

A. Well, occasionally passing just a few words.

Q. I mean about that paper?

A. Yes, with Mr. Fieldman, the treasurer.

Q. What talk did you have with Mr. Fieldman and when and where?

A. Well, I could not tell you the exact date but it was a
47 week before the 24th, during that week when they told me, they called me up and they told me they want again to renew the note.

Q. You mean this was a telephone talk?

A. What, no; they called me up on the telephone and they asked me.

Q. I say it was a telephone talk, a talk over the telephone?

A. I am trying to explain, not over the telephone, they asked me generally when I will be around there to come in, so when I came in my son took me aside and started to tell me, of course I made arrangements to use up the money and they told me they wanted to lend it again, and I told them I did not like the idea, I did not mind to give it to them for so long and I did not like it and they started to tell me that a little they are tied up in collections and that they expect towards the end of a couple of months later they will be free, more free, and they want it for a couple of months more. I told them if that is the case I want to have security, particularly I did not like the idea.

Q. All I want is what was said. With whom was this talk mainly?

A. With my son.

Q. Did you have any further talk with Mr. Fieldman at that time?

A. Yes, not about the same thing but not much, the main talk was with my son.

Q. What further was said? You said you wanted some security?

A. Yes, I wanted some security. Well, they told me they wanted, they could not, it would be kind of compromising themselves to be giving away the checks, somebody should collect it and they could not do it so they said that they could do it providing they made ar-
48 rangements that they should be able to keep on collecting the checks and everything until I will find it advisable that I should call it in but if ever I did not find it advisable in any way or manner so that nobody should know about it and they should keep on collecting the checks.

Q. And using the money?

A. And using the money, certainly.

Q. Then you talked with them further about what the terms of the arrangements should be?

A. I told them all I want, that is what we had agreed, and accordingly this paper was drawn up.

Q. Who drew it up?

By Mr. Posner:

Q. You say accordingly?

A. According to our understanding.

Q. You mean this paper was to be your talk and understanding?

A. Yes.

By Mr. Bacon:

Q. Do you know who drew up this paper?

A. Well, I had some similar papers in my office, copies of con-

tracts, which is usually done in the same way, and I brought it to them and I showed them something, that is what I want.

Q. Do you know what papers those were that you showed them?

A. Oh, I have different papers.

Q. I say do you know which ones they were? Can you identify them?

A. What?

Q. Which papers you showed them?

A. Well, I remember I had some blanks from Wormer & Company and the State Bank, they were just some printed blanks and I showed them and I told them something like it and they simply extracted something from these papers and they made accordingly.

49 Q. Do you know who drew the paper up?

A. No, simply the boys gave me that.

Q. And then they brought you this paper?

A. Yes.

Q. What was done about your existing debt, the note?

A. On the next day they changed the note.

Q. They gave you a new note in the place of the old one?

A. Yes.

Q. How large was the new note?

A. $16,000, the same amount. They paid me off the interest and they gave me a new note.

Q. That is on the 24th of May?

A. The 24th of May.

By Mr. Posner:

Q. They paid you interest on the old note?

A. For the old note. I gave them away the old note and they gave me a new note.

Q. You mean gave them back?

A. Gave them back.

By Mr. Bacon:

Q. After that did you make any further loans to the company?

A. That same note became, on July 1st I gave them $15,000 again.

Q. Additional?

A. Additional, yes, and then when this note became due on July 24th it was renewed again, the first note.

Q. And for how long?

A. Two months.

Q. That came due again on the 24th of September?

A. September, yes.

Q. At the time this paper was executed did they hand you a list of the accounts at the time they made this paper?

50 A. Yes, it was understood that they should give me every month a list of the accounts.

Q. Did they hand that list of the accounts to you at the same time

they handed you that paper (Exhibit "2" for identification) or a day or two later?

A. I really could not remember exactly whether it was exactly ready or not because it was just a couple of days it was spoken about and made a paper and I could not say exactly whether it was this day or it was a day later.

Q. They did not hand you the two papers together?

A. I am telling you I do not remember. It is a thing I did not take because I did not use the accounts at that time.

Q. Did they give you each month a list of the accounts?

A. Yes.

Q. It is a pretty long list, isn't it?

A. Yes.

Q. Each time?

A. Each time, yes.

Q. Covers ten to fifteen pages?

A. Well, I do not know exactly how many pages it covers but I know it was always something like $100,000 or $120,000, something like that. The last one was about $90,000.

By Mr. Posner:

Q. What do you mean the last one?

A. The last account I got was about $90,000 was the amount, I never counted the pages.

By Mr. Bacon:

Q. I have here a list which was made up on September 20th, eleven pages long, single space. It was quite a long document each time?

A. Yes, it was.

51 Q. Have you got the different statements that they rendered you of the accounts?

A. Only the last one.

Q. What did you do with the earlier ones?

A. I simply destroyed it.

Q. You say the last one was about $90,000?

A. Yes, I think so.

Q. Have you that one?

A. Yes.

Q. And have you it here?

A. Yes, the list.

Q. May I see it?

Mr. Posner: Certainly.

(Counsel produces paper.)

Q. Did you examine these different lists as you got them?

A. I just looked at the balance, I did not care for it because I only wanted it should be two or three times as much as my debt.

Q. You knew they were collecting and paying off and getting new receivables all the time?

A. That was according to the agreement, yes.

Q. On this list of yours I will ask you have you found any of the following receivables, they are arranged practically in alphabetical order. Do you find an account listed there of L. Berman, somewhere between $1,000 and $1,200? Look and see if you find it there?

A. I could not answer you that because it would be for me very hard to follow up the list. I know the last time when I checked up the list I had to call in my boy to check with me. They have it in such a funny way, it is not strictly alphabetically. It is some kind of a mixed way, kind of a mixed system, it is very hard.

Q. There are a number of items that do not appear there. There were certain advances to sales men, I want to see if they are
52 on that list?

A. They are accounts for merchandise only. I wanted responsible people.

Q. Did not they ever report to you the names and amounts of their own salesmen?

A. No, I knew no particulars of their business.

Q. This statement that you have of September 23rd what is the total amount of receivables shown on that?

A. I think it is about $90,000.

Q. I want the exact figures?

Mr. Posner: $89,505.44.

Q. Did you have some talk with some member of the Hub Carpet Company with regard to the kind of list they were to give you?

A. Yes.

Q. When was that?

A. In the beginning.

Q. That is last May?

A. Yes, in May.

Q. And with whom was that talk?

A. With my son.

Q. And where?

A. Well, I spoke with him in so many places it may have been at a restaurant at lunch, it may have been in the store, I cannot say exactly.

Q. What was said about this list, what did he say and what did you say?

Mr. Posner: Mr. Referee, I object, there have been a great many questions asked without objection as to conversations preceding the making of a document in May of this year, over four months preceding the bankruptcy. I feel the time has come when I should object on the ground that all these conversations were merged in the written document and broad as the rules of evidence are on
53 hearings of this kind I think we have reached the point where there should be a ruling on the objection to taking further testimony on this line.

The Referee: There is no issue joined and I cannot very well know what the examining counsel may have in his mind. I do not see that I can limit the examination.

A. In the beginning I said I wanted to have a list so that I could have the accounts that I should be secured with my money, that is all. I cannot say I remember every word, we kept on talking for core than a week, for more than a week's time we kept on talking. We used to go to lunch together and we kept on talking, they did not like the idea but I did not feel secured.

Q. Was there anything said about whether the list should be itemized or not, giving the separate accounts?

A. I do not remember that but what I do know personally the way I believe is all I wanted was there should be about two or three times as much the amount as mine, that is all I know, I do not remember if there was anything particularly said. I know that whatever was said they made out a paper and I was satisfied with it, that is all.

Q. They sent you those lists each month?

A. Yes.

Q. Were those lists made out like the one you have produced here?

A. Yes.

Q. With individual names?

A. Yes.

Q. Addresses and the amounts of individual claims?

A. Yes.

Q. Did these separate lists month after month show the amounts had been collected on various claims and new claims had
54 arisen?

A. I never examined the list thoroughly in that way. I understood during the month, I could not imagine in any other way they must have collected and they must have bought some merchandise and the amounts changed but I never examined it thoroughly because I did not care for it.

Q. The amounts did change in these different reports?

A. Yes.

Q. Did you collect any or receive from them any proceeds of collection of any of these claims prior to the 19th of September, 1921?

A. No.

Q. Not a cent?

A. No.

Q. And you knew all through that time that they were collecting and using the moneys in the business?

A. Of course I knew because that was understood in the agreement.

Q. Since the 17th of September, 1921, which was Saturday, I think you went to them on that day, didn't you, and told them that you wanted the accounts turned over to you for collection?

A. Yes.

Q. And had they made a deposit in the bank that day?

A. I do not know, I could not tell you.

Q. Did they turn over to you any moneys collected that day?

A. No.

Q. On the 19th you did?

A. They started to collect on the 19th but I did not get it until the 20th, the next day.

Q. What did they send you, their own check for the proceeds of what they had collected?
A. No, they turned me over the checks.
Q. What did you do with them?
A. I deposited them.
55 Q. To your own credit?
A. Yes, in my bank.
Q. And were there some notes as well as checks?
A. Yes.
Q. Where are the notes?
A. I gave them to the bank for collection.
Q. What bank?
A. The Mechanics & Metals Bank, 103d Street and 1st Avenue.
Q. That is their branch uptown?
A. Yes.
Q. And is that your regular bank?
A. Yes.
Q. Do you know what the amount of checks collected by you from the 17th of September on amount to?
A. Yes.

Mr. Posner: I will ask my client to make up a statement and give you showing what collections he has made and he will present it.
Witness: Yes, there was one check came back, the people stopped payment, and I have a complete list of the checks, of the trade acceptances, of the notes, certainly I have a complete list.

Q. What day was this last statement of accounts which you have sent you?
A. The 23d.

By Mr. Posner:

Q. With each monthly account that you received did you receive a letter from the Hub Carpet Company?
A. Yes.
Q. Substantially like the letter attached to the statement of September 23d?
A. Yes.

Mr. Bacon: That I object to. I would like to see the letters themselves.

56 By Mr. Bacon:

Q. You have produced here the list dated September 23d which is a carbon copy of a list of the accounts and a letter pinned to it or clipped to it on the stationery of the Hub Carpet Company reading as follows:

"Sept. 23, 1921.

Mr. Aaron Ratner, 1804 Arthur Ave., New York City, N. Y.

DEAR FATHER:

Enclosed find the September list of accounts receivable assigned to you in accordance with our agreement of May 23d, 1921.

Yours,

THE HUB CARPET CO., INC.
ABNER RATNER,
Vice-President."

that is correct, isn't it?

A. Yes.

Q. You received each month a list similar to this one?

A. Yes.

Q. And some letter more or less of that character?

A. Yes.

Q. Have you those letters?

A. No.

Q. Those have been destroyed?

A. I simply used to throw them out after.

By Mr. Posner:

Q. As you got each new list?

A. Yes.

By Mr. Bacon:

Q. The amount of collections you received during the
57 week of September 19th to September 26th was approximately $13,000, was it not?

A. I can tell you more correct. I happen to have here my bank book and I can tell you how much I deposited. I deposit one time $5,566.67, I deposit a second time $4,869.03, and then $1,065.30, and $106 50. Out of this a check came back for $159.46.

Q. How about notes?

A. I will give you the notes. It was $133.71, $1,000, $200.00, $200.00, $492.08, $157.92, $80.16. Some of them are trade acceptances and some of them are notes which I cannot use there themselves. This is my bank book but when I bring you the list then I will specify.

Q. Mr. Ratner, you produce here in the first place your check No. 639 on the Mechanics & Metals National Bank, Harlem branch, September 24th, 1920, to the Hub Carpet Company Inc., for $20,000 stamped "paid" and "paid through the New York Clearing House by the Seaboard National Bank September 27th, 1920?"

A. Yes.

Q. In the second place your check No. 718 March 24th, 1921, on the same bank to the order of the Hub Carpet Co., for $15,000 stamped "paid" March 25th 1921" and endorsed "received payment

through the New York Clearing House by the Irving National Bank."

In the third place your check No. 748 of July 1st, 1921, on the same Mechanics & Metals Bank for $15,000 stamped "paid" July 5th, 1921" and stamped "Received payment through the New York Clearing House by the Irving National Bank July 5th, 1921."

In the next place, a note for $15,000 made by the Hub Carpet Company or purporting to be made by the Hub Carpet Company to your own order dated July 1st, 1921, for $15,000, due Oc-
58 tober 1st, 1921, payable at 23 West 24th Street, New York, N. Y.

And a further note dated July 24th, 1921, by Hub Carpet Company signed Irving Fieldman, treasurer, promising to pay $15,000 on September 24th, 1921, to your order at 23 West 24th Street.

Lastly a check No. 1580 of S. Tekulsky to the order of the Hub Carpet Company for $159.46 on the Manufacturers Trust Company, Brooklyn, N. Y., endorsed "Pay to the order of Aaron Ratner, the Hub Carpet Company, Abner Ratner vice pres." endorsed in turn "Aaron Ratner" and stamped "Payment stopped."

That is correct?

A. Yes.

Q. And the signatures on the three checks on the Mechanics & Metals National Bank are your signatures?

A. Yes.

Q. And the signatures on the note of July 1st is your son's?

A. Yes.

Q. And the signature on the note of July 24th is Mr. Feldman's?

A. Yes.

Q. And the other one of course you know nothing about?

A. No.

Q. Except this is the check which you received about the 24th of September, and deposited for collection which was returned unpaid as you told us?

A. Yes.

——— ———.

Subscribed to before me this — day of ———, 1921.

——— ———,

Referee in Bankruptcy.

(Endorsed:) Filed Nov. 14, 1921, 12 M. U. S. District Court, S. D. of N. Y.

59 *Replying Affidavit of Aaron Ratner Read in Support of Motion.*

United States District Court, Southern District of New York.

In the Matter of THE HUB CARPET COMPANY, Alleged Bankrupt.

STATE OF NEW YORK,
County of New York, ss:

Aaron Ratner being duly sworn, deposes and says: Voluminous affidavits made by Wallace Benedict and Seldon Bacon, with lengthy exhibits thereto attached, have been submitted upon the motion made by me herein; I have read these documents, and except for a conversation recited to have been held with me and except for a transcript of my testimony taken under Section 21-*a* in behalf of the Receiver, every matter and thing referred to in these documents is utterly foreign to me, outside of my knowledge, unconnected with me, and as I am informed by my attorney and verily believe, utterly irrelevant to the issues before this court.

I am informed by my attorney that upon the hearing of this motion on the 21st instant, which has since been adjourned for argument until the 31st instant, counsel for the Receiver stated to the court that no dispute is raised as to the facts, but that the question before it is one altogether of law, namely, whether or not the agreement is valid and whether I am entitled to the relief prayed
60 for despite the fact that these moneys were advanced by me at or about the time of and in connection with the execution and delivery to me by the Hub Carpet Company on May 23rd, 1921, of the agreement Exhibit 1. I am advised therefore, that in view of this understanding, it is not necessary for me in detail to review the affidavits submitted in behalf of the Receiver, but that simply for the purposes of record, it is proper that this reply affidavit be made.

I knew at the time the agreement in question, and prior thereto, that my son and others were interested in the Hub Carpet Company; indeed it was because my son was interested in it that I undertook to lend the company any money whatever. At the same time I felt that I should be secured, and it was for that reason, as shown in my testimony, that I demanded the security of assigned accounts.

On May 24th, 1921, pursuant to the agreement, and my understanding between the parties, a detailed statement giving the names of all the accounts upon the books of the Hub Carpet Company was handed to me; on that day there was due to me the sum of Fifteen thousand dollars ($15,000) from the Hub Carpet Company, and, therefore, relying upon the agreement I returned to the company its note representing its obligation and took its new note dated May 24th, 1921, payable July 24th, 1921. On or about June 23rd or 24th, 1921, I received from the said company the list of its accounts receivable set forth in detail, giving the names of customers and the

amounts due from them. On July 1st, still relying upon the agreement in question, I lent to the Hub Carpet Company, at its
61 request, the additional sum of Fifteen thousand dollars ($15,000) making the total of Thirty thousand dollars ($30,000) referred to in that agreement. At that time the company delivered to me its note for Fifteen thousand dollars ($15,000) payable October 1st, 1921. On July 24th I received again a list showing in detail the accounts receivable upon the books of the company, at which time also I surrendered up its note July 24th, and dated May 24th, and received in its place a note for Fifteen thousand dollars ($15,000) due September 24th, 1921; so that at the time of the commencement of this proceeding I had and now have in my possession the last two mentioned notes, each for Fifteen thousand dollars ($15,000) one dated July 1st, 1921, payable October 1st, 1921, and the second dated July 24th, 1921, payable September 24th, 1921. In August and again in September I received from the Hub Carpet Company like lists of accounts receivable, with each of these lists, beginning at the outset in May, 1921, I received a letter of transmittal substantially in the form of the letter of September 23rd shown in the testimony, which letter reads as follows:

"Sept. 23, 1921.

Mr. Aaron Ratner, 1804 Arthur Ave., New York City, N. Y.

DEAR FATHER:

Enclosed find the September list of accounts receivable assigned to you in accordance with our agreement of May 23rd 1921.

Yours,

THE HUB CARPET CO., INC.,
ABNER RATNER,
Vice President."

62 The list of receivables was substantially similar in general form to the receivables list of September 24th, which was marked in evidence upon my examination under 21-*a* and which is respectfully made part of this affidavit.

On September 17th, 1921, I learned that certain of the creditors of the company had become dissatisfied and were demanding payment of past due accounts. I did not know then and certainly did not believe in the least, that the company was insolvent, feeling simply that like all businesses in times of depression it was having difficulty because of the more or less unreasonable pressure of one creditor or another; I know from my own experience and from my own knowledge of many years in business in the City of New York, that it is a very common occurrence for firms of soundest financial respo-sibility to undergo difficult periods when, because of slow collections or slow turn-over, they are unable to meet in cash the pressing demands of creditors which could be amply met if reasonable consideration were shown by the creditors. This is precisely the situation in which I believed the Hub Carpet Company found itself at

that time. Nevertheless, I felt that I was entitled to and I demanded the protection which by agreement had been given to me, and in reliance upon which I had advanced the $30,000. I so expressed my self to the offices of the company on September 17, 1921, and it was agreed that I should receive the checks that would thereafter come in in connection with its accounts receivable. Thereafter, and until the appointment of the Receiver, I did receive the checks, trade acceptances and notes which came in from customers who appeared upon the books of the Hub Carpet Company as debtors,
63 and whose names appeared on the lists delivered to me, these obligations being turned over to me in precisely the form in which they were received, and, so far as I know, constituted all the obligations received by the company following my demand on September 17th.

As stated by me in my original affidavit, the total amount which I have thus far collected is $11,581.75, through the use of the checks and documents turned over to me as aforesaid, the balance remaining due now being $18,418.25, with interest.

With the affairs of the Hub Carpet Company and the conduct of its business I had absolutely nothing to do at any time, and had absolutely no knowledge of them. I know nothing of the minutes of its various meetings, except that I was informed that the corporation had, on May 23rd, 1921, adopted resolutions properly authorizing the execution of the agreement with me. The receiver and his counsel do not claim that I knew, and I assert that I did not know anything whatever concerning a meeting of January 3rd, 1921, at which the directors of the company adopted resolutions fixing the salaries of the officers, nor do I know whether such salaries were ever paid; I know nothing about any mortgage executed on September 15th, 1921, to one Husbands, nor of any payments made in connection therewith; I know nothing of any notes due to the Bank of Manhattan Company or any other bank; I know nothing of the personal liability upon these notes on the part of any of the directors; I never knew who the creditors were who were pressing for payment nor how far in arrears the Hub Carpet Company was, if at all, in connection with their accounts. I took no part in any way, nor was I present or represented at the examination of the officers of the corpo-
64 ration when they gave the testimony which the receiver quotes at length in this proceeding.

So far as I read that testimony however, it quite correctly sets out the facts concerning the making of my agreement of May 23rd. A great many things were discussed before that agreement was executed, but everything that was discussed and the final conclusions reached were set forth in that agreement; in other words, to quote the language of one of the witnesses as set forth at folios 18 and 19 of the testimony attached to Mr. Bacon's affidavit

"It was not a question of what was said, it is a question of what was actually put down on paper * * * Everything that was contemplated was put down in black and white at the time, and the matter gone over carefully."

In view of the fact that certain items are set forth in Exhibit D as having been delivered to me on account of the money due, I submit herewith, marked Exhibit 2, a detailed statement of all the sums which I have collected as herein above mentioned.

AARON RATNER.

Sworn to before me this 28th day of October, 1921.

HELEN LEVIN,
Notary Public, Kings County.

Kings County Clerk's No. 162.
Kings Co. Register's No. 2178.
Certificate filed in New York County.
Clerk's No. 462; Register's No. 2367.
Commission expires March 30th, 1922.

65 EXHIBIT 2.

Representing Checks and Payments Received by Aaron Ratner.

Checks:

W. C. Green Furn. Co.	26.02
Boston Store Co.	120.96
F. L. Coran & Co.	156.48
Gan & Gong	25.78
Shadock & Namendin	35.00
E. Menen	27.28
Weil & Co.	12.96
M. C. Bricker	83.82
A. Crolick & Co.	92.16
Playerton Co.	112.42
I. Klinghoffer	65.48
H. Fisher	375.42
M. Usliner	31.20
A. Feldman	200.00
Sam Herzfeld	948.22
A. Kranick	23.86
Geo. A. Thurin	165.50
M. Rothstein	137.11
M. Blank	32.21
Guarantee Fur Co.	43.39
London Turn	19.28
Marthaum Bros.	1,116.99
Union Furn.	25.38
M. Lehrer	75.00
Rochester Store	104.99
A. Weitzner	72.81
Great N. Y. Furn.	218.71
Serviss passenger	166.69
G. Glick	57.98
J. Checkman	103.57

Magnet Furn.	37.32	
G. G. Seaman	87.75	
66 Miller & Plores	49.16	
M. Strelzer	23.33	
G. Naumin	36.40	
A. Schattenfeld	155.40	
Onandaga Spec. Co.	41.28	
Max Lipitz	67.50	
F. B. Fornwald	182.40	
Tonella & Co.	86.40	
Thomas Furn.	97.92	
J. D. Vanderver	31.20	
Trade acceptances:		
Sam Herzfeld (protested)		1,000.00
Notes:		
M. Capuano (collected)		133.71
W. C. Green		83.50
Dated checks:		
Subitzky		50.
Subitzky		56.50
Checks:		
Nathan Adlorb	22.63	
Milne Home Furn.	245.76	
M. Silverstein	73.68	
Adirondack Furn.	106.56	
R. Isenberg	300.00	
Embie Furn.	340.47	
Long Island Furn.	57.66	
Kneller Furn.	156.06	
Charles Levy	41.56	
Ben. Federman	86.40	
Winegar Furn.	43.92	
67 Loerbenberg Bros.	533.24	
Philip Cohan	32.12	
H. H. Spitler	71.19	
S. Tekulsky (stopped payt.)	159.46	
L. M. Nelson	49.64	
I. Spitz	76.32	
Simon Draper	78.50	
Sharnack & Conelly	46.08	
M. Phillips	276.52	
J. Peltin	67.95	
National Furn.	151.59	
Montgomery Brooks	80.15	
Mastbaum Bros.	300.84	

Jos. Litshin	38.20	
G. Lebowitz	23.33	
D. Hoffman	45.50	
M. Henick	205.22	
I. Goodman	162.02	
Globe Furn. Co.	600.48	
Gelgood Bros.	339.66	
Gerard Caccesse	22.56	
Binghamton Auct.	22.56	
Manhattan Carpet	70.56	
Joseph Cohan	154.52	
Lawrence Furn.	54.18	
Mesnik Bros.	96.00	
Philip Butler	154.06	
J. Graziano	93.60	
Modern Furn.	71.44	
Ranieri Furn.	26.51	
Burden & Co. & John McCormick	49.62	
United Furn.	94.32	
Freeland Koonz	54.00	
Sam Shaivitz	66.24	
68 Weybosset Furn.	21.60	
Elite Store	22.03	
Prince Furn.	36.62	
Notes:		
United Furn. Co.		200.00
" "		200.00
" "		492.08
Trade acceptances:		
Jefferson & Leneck		159.92
Home Furn. Co.		80.16
Dated Checks	106.50	
	$11,607.50	
Plus note Capuano col.	133.71	
	$11,741.21	
Less return check of Tekulsky	159.46	
	$11,581.75	$2,346.37

(Endorsed:) Filed Nov. 14, 1921, 12 M. U. S. District Court, S. D. of N. Y.

69 *Replying Affidavit of Selden Bacon Read in Opposition to Motion.*

United States District Court, Southern District of New York.

In the Matter of HUB CARPET COMPANY, Alleged Bankrupt.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Selden Bacon, being duly sworn, deposes and says, that he is the attorney and counsel for the Receiver herein.

Deponent denies that he stated to this court on the first hearing of this motion that there is no dispute as to the facts in this matter. It was the counsel for Mr. Ratner who stated that there was no dispute as to the facts, and deponent declined to agree with that statement while urging that facts were conceded by Mr. Ratner that rendered the assignment of accounts to him void as fraudulent and the court suggested on the argument that it thought that the question of law arising on the admitted facts should be first passed on by the court before referring the case for any hearing as to any disputed matters.

Deponent further says that the attorney for Mr. Ratner, Mr. Louis S. Posner, was not in court at the time of the argument, which
70 was on October 24, 1921, not October 21st, as stated in the affidavit of Mr. Ratner, and that consequently any information derived by Mr. Ratner from Mr. Posner is only at third hand and no reason is given why the affidavit of the gentleman who was present representing Mr. Posner is not presented.

SELDEN BACON.

Subscribed and sworn to before me this 31st day of October, 1921.

[SEAL.] WM. G. PHILLIPS,
Notary Public.

Kings Co., N. Y., No. 5.
Certificate filed in N. Y. Co., No. 32.
Kings Co. Register's No. 2005.
N. Y. Co. Register's No. 2036.

(Endorsed:) Filed Nov. 14, 1921, 12 M. U. S. District Court, S. D. of N. Y.

71 *Opinion.*

United States District Court, Southern District of New York.

In re HUB CARPET COMPANY; EX PARTE AARON RATNER.

Motion by an Assignee of Accounts, one Aaron Ratner, Against a Receiver in Bankruptcy to Require Him to Pay Over Sums Collected on the Accounts under the Following Circumstances.

On May 23, 1921, the bankrupt company was indebted to one Ratner in the sum of fifteen thousand dollars. Wishing to give him security they executed a contract transferring to him all their accounts outstanding at the time and gave him a full list of them. The contract included not only accounts then existing but any such as should come into existence in the future. At the end of each thirty days the bankrupt gave Ratner a new list specifying each account but comprising all their open accounts at the time. On one such occasion Ratner lent them fifteen thousand dollars more upon the faith of these assignments. Meanwhile the bankrupt continued as before to collect on its accounts freely and to use the proceeds in its business. This was done with the consent and by an agreement between them and Ratner. On September 17, 1921, Ratner becoming con-
72 cerned over the solvency of the bankrupt began collecting on the assigned accounts, and has now taken in some eleven thousand dollars. The petition in bankruptcy was filed more than four months after May 23, 1921, and the receiver has collected upon accounts which were contained in the lists delivered to Ratner before the bankruptcy.

The receiver argues that the reserved right of the bankrupt to collect the assigned accounts and to use the proceeds was inconsistent with the existence of a genuine transfer, a fraud on creditors, and that the security is void.

Louis Posner for the motion.
Selden Bacon opposed.

LEARNED HAND, *D. J.*:

There can be no doubt that if the agreement had been that the bankrupt should always substitute assigned accounts in amount up to the value of those in existence on May 23, 1921, the security would have been valid. Sexton v. Kessler, 225 U. S. 545; Chapman v. Hunt, 254 Fed. R. 768 (C. C. A. 2nd). In Robinson v. Elliott, 22 Wall. 513, a chattel mortgage was before the court which provided that the mortgagor "may sell the same" (the chattels) "and supply their places with other goods and the goods substituted by purchase for those sold shall * * * be subjected to the lien of this mortgage." This was held a fraud, not under the Indiana statutes which were thought to be inapplicable, but at common law. The case very clearly went upon the doctrine of reputed ownership, p. 525, though

the precise deception involved was perhaps not analyzed. The
73 law so established is the same as that at least preferred in Skilton v. Codington, 185 N. Y. 80, 91, though more stringent than the rule in the New York case of Brackett v. Harvey, 91 N. Y. 214. The point, however, is that it was rested upon the doctrine of reputed ownership. The New York law, which recognizes the same rule, has not so definitely declared its basis, Edgell v. Hart, 9 N. Y. 213; Russell v. Winne, 37 N. Y. 591; Potts v. Hart, 99 N. Y. 713; Hangen v. Hachameister, 114 N. Y. 566; Skilton v. Codington, supra. Yet all these cases did involve chattels, as did In re Leslie-Judge Co., 272 Fed. R. 886. That decision went on the law well-established, certainly since Russell v. Winne, supra, that the whole mortgage is void if any chattels be covered over which the mortgagor has the right of disposal, In re Volence, 197 Fed. R. 232, In Re Rodin & Kalisch (D. C., S. D. N. Y., July 20, 1917). As I am in any case bound by the ratio decidendi of the Supreme Court and as under that ruling the cases of Sexton v. Kessler, supra, and Chapman v. Hunt, supra, could not have been decided as they were, except that the property was not chattels, it seems necessarily to follow that the doctrine depends only upon reputed ownership. If it does, I do not see how the absence of a provision that the assigned accounts should be kept at a given amount can make any difference. Being by hypothesis assets which are not capable of apparent ownership, and there being no proof in the case of any actual estoppel in favor of any creditors, the transaction is valid as the parties meant it. So far as such a lien "floats" on the property, it "floats" as little when the security is diminished as when it is kept good. That
74 seems to be a matter merely between the lender and the borrower.

Yet the doctrine as laid down in Sexton v. Kessler, supra, went a little further. It clearly presupposed that in the case of property where there could be no reputed ownership, enough rights might be reserved to the mortgagor to become inconsistent with the existence of a lien. Obviously that depends on how you define the requisites of such a lien, and the question was stated to be one of degree, without attempting to fix the crucial point. It was expressly said that a mere promise would not serve; there must be some identification of the property assigned. I should have no doubt under this case that a mere agreement that the lender should have a lien generally upon all accounts would not be enough, but if they be specifically identified as was done in Sexton v. Kessler, supra; Chapman v. Hunt, supra, and Young v. Upson, 115 Fed. R. 192, it seems to me not to matter whether they are always to be kept at a given figure. The same inconsistency or consistency with the lien exists in either case, and it would be regret-able to establish fanciful dis-inctions in a subject not very clear at best.

Now in the case at bar it is true that the accounts were not formally assigned as in Chapman v. Hunt, supra, but the equivalent was done when on the twenty-fourth of each month a list of specified accounts was transmitted to Ratner. No writing is necessary to the

assignment of a chose in action, Union Trust Co. v. Bulkeley, 150 Fed. R. 510, and the intent in transmitting the lists was clear enough. Thereupon the parties meant that these specific
75 accounts should be collateral to Ratner's advances. All this was done pursuant to an agreement antedating the period within which the Bankruptcy Act will unravel the transaction and, so far as I can see, "there is no local or general law that takes from the transaction the effect it was intended to produce," Sexton v. Kessler, supra, 99.

The petitioner may therefore take an order directing the receiver to account for all sums received by him upon any accounts contained in the lists transmitted to Ratner, and that the bankrupt or its trustee execute a formal assignment of the balance of such accounts up to the extent of his advances.

L. H., *D. J.*

November 14, 1921.

76 *Decree.*

At a Stated Term of the United States District Court for the Southern District of New York Held in and for said Southern District, at the Federal Court House, in the City of New York, on the 19th day of November, 1921.

Present: Honorable Learned Hand, District Judge, Presiding.

In the Matter of HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER.

The above entitled matter came on to be heard regularly in its order upon order to show cause of this court upon the petition or affidavit of Aaron Ratner why an order should not be made directing the Receiver to turn over, endorse and deliver to said Aaron Ratner any and all checks, moneys, notes or payments made on account of or arising from or in connection with the bills and accounts receivable of the above named Hub Carpet Company until, together with the amounts theretofore collected by said Aaron Ratner, the total of such payments received by him shall amount to $30,000 and interest with costs and disbursements and for other and further relief, and upon the cross application of the Receiver bring-
77 ing an order denying the application of said Aaron Ratner and further directing the said Aaron Ratner to pay to the Receiver forthwith all the sums received by said Ratner from the Hub Carpet Company since the 17th day of September, 1921, and all the receivables turned over to him since that date under the agreement alleged by him and restraining said Aaron Ratner from interfering with deponent's collection of any of the accounts receivable of the Hub Carpet Company, and from making any further claim under his alleged assignment of such receivables, Louis S. Posner, Esq., appearing on behalf of said Aaron Ratner and Selden Bacon, Esq.,

appearing on behalf of the Receiver, and after hearing counsel for the respective parties, and the Court having filed its opinion herein,

Now, upon motion of the said Aaron Ratner, and upon reading and filing the said order to show cause dated October 19th, 1921, and the affidavit or petition of Aaron Ratner thereto annexed verified the 19th day of October, 1921, and the supporting affidavit of Aaron Ratner verified the 28th day of October, 1921, and upon the affidavit of Wallace Benedict verified the 22nd day of October, 1921, and the affidavit of Selden Bacon verified the 24th day of October, 1921, and the further affidavit of Selden Bacon verified the 31st day of October, 1921, and upon the opinion of this Court herein filed the 14th day of November, 1921,

It is hereby ordered and decreed that the above named Wallace Benedict as Receiver of the Hub Carpet Company account to the petitioner Aaron Ratner for all sums received by said Benedict as such Receiver upon any accounts contained in any of the lists
78 of accounts transmitted to Aaron Ratner and that the Bankrupt or its trustee herein execute a formal assignment of the balance of any and all such accounts up to the extent of the unpaid advances of said Aaron Ratner to the Bankrupt, together with interest thereon from the date of such advances, and

It is further ordered and decreed that the petition of the said Benedict as such Receiver that an order be herein made denying the application of said Aaron Ratner and ordering and directing the said Aaron Ratner to pay to said Benedict as such Receiver forthwith all the sums so received by said Ratner from the Hub Carpet Company since the 17th day of September, 1921, and all the receivables so turned over to him since that date under the agreement under which said Ratner claimed and that said Ratner be specifically restrained and enjoined from interfering with the Receiver's collection of any of the accounts receivable of the Hub Carpet Company and from making any further claim under the instrument asserted by him, be and the same hereby is in all respects denied.

LEARNED HAND,
District Judge.

(Endorsed.)

Service of a copy of the within is hereby admitted.
Dated, November 18, 1921.

LOUIS S. POSNER,
Attorney for Aaron Ratner.

79 *Assignment of Errors.*

United States District Court, Southern District of New York.

In re HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER.

Wallace Benedict as Receiver of the Hub Carpet Company, the respondent and petitioner for leave to appeal, hereby assigns the following errors as grounds for his appeal in the above entitled matter:

1. The Court erred in directing the Receiver to account to the petitioner Aaron Ratner for all sums received by him upon any accounts contained in the lists transmitted to Ratner.

2. The Court erred in directing that the bankrupt or its trustee execute a formal assignment of the balances of such accounts to said Ratner up to the extent of his advances.

3. The Court erred in sustaining the assignment to Ratner alleged in the petition as a valid instrument.

4. The Court erred in holding that the assignment to Ratner alleged in the petition was free from fraud.

80 5. The Court erred in holding that if the agreement alleged in the petition had been that the bankrupt should always substitute assigned accounts up to the value of those in existence on May 23, 1921, the security would have been valid.

6. The Court erred in holding that the decision in Robinson v. Elliott, 22 Wallace 513, went upon the doctrine of imputed ownership.

7. The Court erred in holding that the principle of imputed ownership is that on which rests the decision in Skilton v. Codington, 185 N. Y. 80.

8. The Court erred in holding that the New York Courts have not definitely declared the basis of their rule that agreements permitting a mortgagor to sell the mortgaged property and apply the proceeds to his own use under the mortgage were fraudulent and void as against creditors.

9. The Court erred in holding that the rules established by the decisions in Russel v. Winne, 37 N. Y. 591, Edgell v. Hart, 9 N. Y. 213, Potts v. Hart, 99 N. Y. 713, Hangen v. Hachmeister, 114 N. Y. 566, Skilton v. Codington, 185 N. Y. 80, In re Leslie Judge Co., 272 Fed. Rep. 886, and other cases as to the result of a mortgage of allowing the mortgagor, under cover of the mortgage to dispose of the mortgaged property and appropriate the proceeds for its own purposes, was limited in its application to cases of tangible property, and had no application to assigned accounts.

81 10. The Court erred in holding that the case of Sexton v. Kessler could not have been decided as it was except that the property was not chattels.

11. The Court erred in holding that the case of Chapman v. Hunt could not have been decided as it was except that the property was not chattels.

12. The Court erred in holding that the doctrine that allowing the mortgagor under cover of the mortgage to dispose of the mortgaged property and appropriate the proceeds for its own purposes is a fraud and renders the mortgage void depends only upon reputed ownership.

13. The Court erred in holding that the absence of a provision that the assigned accounts should be kept at a given amount could make no difference.

14. The Court erred in holding that the assignment of the accounts to the petitioner Ratner set up in the petition was valid as the parties meant it.

15. The Court erred in holding that the security of such an assignment floats as little when the security is diminished as when it is kept good.

16. The Court erred in holding that the diminution of the security by the mortgagor's appropriating the proceeds of the mortgaged property to its own use by agreement of the lender contemporaneous with the mortgage is a matter merely between the lender and the borrower.

82 17. The Court erred in holding that the monthly transmission to Ratner of lists of existing accounts receivable was an identification of the property assigned.

18. The Court erred in holding that it did not matter whether the assigned accounts were always to be kept at a given figure.

19. The Court erred in holding that the monthly transmission of a list of specified accounts to Ratner was the equivalent of a formal assignment of the accounts contained in the list.

20. The Court erred in holding that there is no local or general law that takes from the transaction the effect it was intended to produce.

21. The Court erred in failing to hold that the assignment of the accounts to Ratner alleged in the petition was affected by a contemporaneous agreement between the parties thereto that the Hub Carpet Company might collect its receivables, the subject of such assignments, and apply the proceeds to its own use, until such time as the petitioner Ratner should demand turning over the same to him.

22. The Court erred in failing to hold that said Ratner made no such demand until the 17th day of September, 1921, and that in the meantime the Hub Carpet Company had, after the execution of such assignment, with the consent of said Ratner, collected on such receivables so assigned to him by the instrument in question and applied to its own use over $150,000, being more than four
83 times as much as the total amount of said Ratner's claim.

23. The Court erred in failing to hold that the Hub Carpet Co. in making the assignment to Aaron Ratner and said Ratner in receiving the same intentionally concealed the same from the persons to whom the Carpet Co. was indebted.

24. The Court erred in failing to hold that the arrangement between the Hub Carpet Co. and the petitioner Ratner for subsequent collection of its receivables by the Hub Carpet Co. and its use of the

proceeds in its own business was intended by them both, among other purposes, to conceal the assignment from the creditors of the Hub Carpet Co. until said Ratner should demand that such receivables be turned over to him.

25. The Court erred in failing to hold the assignment of accounts from the bankrupt to Ratner fraudulent and void.

26. The Court erred in failing to hold that such arrangement for collection of assigned receivables by the Hub Carpet Company and application of the proceeds to its own use made the mortgage fraudulent and void as to the creditors of said Hub Carpet Company and this receiver.

27. The Court erred in failing to hold that by his allowing the Hub Carpet Company to collect and apply to its own use the proceeds of the assigned receivables in excess of the total amount of his claim said Ratner had waived and abandoned all right to other receivables under such assignment of the accounts receivable.

84 28. The Court erred in failing to hold that in so far as it held the transmissions of lists of accounts and bills receivable in the months of July, August and September, 1921, amounted to assignments of such receivables they were preferential, given to secure antecedent indebtedness, and void as preferential under the four months rule.

29. The Court erred in failing to hold that in so far as it held the transmission of a list of accounts and bills receivable in the month of June, 1921, amounted to an assignment of such receivables, it was as to all then pre-existing indebtedness to said Ratner given to secure antecedent indebtedness and void as preferential under the four months rule.

30. The Court erred in refusing to hold that the rule that provisions, contained in or governing any transfer of property as security, that the debtor may dispose of the assigned property and apply the proceeds thereof to his own use, without accounting to the debtor therefor, operate in the most effectual manner to ward off other creditors, and render the transfer fraudulent, and this irrespective of whether the character of the property transferred be tangible or intangible.

31. The Court erred in refusing to order the said Ratner to return to the Receiver all cash, checks and bills receivable belonging to the Hub Carpet Company received by said Ratner between September 16th and 27th, 1921, by virtue of the assignment set forth in the papers on which the petition and cross-petition of the Receiver were heard.

85 32. The Court erred in failing to dismiss on the merits the petition of said Ratner.

33. The Court erred in denying the cross-petition of the Receiver.

34. The Court erred in awarding relief against the Trustee in bankruptcy of the Hub Carpet Company, who was not before the Court.

Respectfully submitted,

SELDEN BACON,
Solicitor for Petitioner.

43 Exchange Place, New York City.

(Endorsed:) Filed Nov. 22, 1921, 10 A. M., U. S. District Court, S. D. of N. Y.

86 *Notice of Filing Bond.*

District Court of the United States of America for the Southern District of New York.

In the Matter of HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER.

Please take notice, that a bond, of which the annexed is a copy, was duly filed herein on the twenty-second day of November, 1921, with the Clerk of this Court.

Dated New York, November 22, 1921.

Yours respectfully,

SELDEN BACON,
Solicitor for Receiver in Bankruptcy, Appellant.

Office & Post Office Address: 43 Exchange Place, Borough of Manhattan, New York City.

To Louis S. Posner, Esq., Solicitor for Aaron Ratner, Appellee, 15 Broad Street, Borough of Manhattan, New York City.

Service of a copy of the annexed Bond, with notice of filing, is hereby admitted.

Dated November 22, 1921.

LOUIS S. POSNER,
Solicitor for Aaron Ratner, Appellee.

87 *Bond on Appeal.*

District Court of the United States of America for the Southern District of New York, in the Second Circuit.

In the Matter of HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER.

Know all men by these presents, That Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, as principal, and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broad-

way, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Aaron Ratner, in the sum of Five Hundred ($500.00) Dollars to be paid to the said Aaron Ratner, for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 21st day of November, 1921.

88 Whereas, the above named Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above entitled suit, by a Judge of the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, shall prosecute said appeal to effect, and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

[SEAL.] WALLACE BENEDICT,
As Receiver of Hub Carpet Company.

[SEAL.] NATIONAL SURETY COMPANY,
By H. E. EMMETT,
Resident Vice-President.

Attest:
N. V. TYNAN,
Resident Assistant Secretary.

89 STATE OF NEW YORK,
County of New York, ss:

On this 21st day of November, 1921, before me personally came the within named Wallace Benedict, to me known, and known to me to be the individual described in and who executed the within bond as Receiver of Hub Carpet Company and acknowledged that he executed the same as such Receiver for the uses and purposes therein expressed.

[Notarial Seal.] WM. G. PHILLIPS.

Notary Public, Kings Co. N. Y. No. 5.
Certificate filed in N. Y. Co. No. 32.
Kings Co. Register's No. 2005.
N. Y. Co. Register's No. 2036.

Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.

STATE OF NEW YORK,
County of New York, ss:

On this 21st day of November, 1921, before me personally came H. E. Emmett, known to *be* to be the Resident Vice-President of

National Surety Company, the corporation described in and which executed the foregoing bond of Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, as surety and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York, that said Company has complied with the provisions of the Act of Congress of August 13, 1894,
90 that the seal affixed to the within Bond of Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, is the corporate seal of said National Surety Company; and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Resident Vice-President of said Company, and that he is acquainted with N. V. Tynan, and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said N. V. Tynan, subscribed to said Bond is in the genuine handwriting of said N. V. Tynan, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed in debts and liabilities of every nature whatsoever, by more than the sum of Ten Million dollars.

H. E. EMMETT.
(Deponent's Signature)

Signed, sworn to, and acknowledged before me this 21st day of November, 1921.

[Notarial Seal.]

M. M. MILLER,
Notary Public for Kings County No. 86.

Certificate filed in New York County No. 40.
Bronx No. 1, Queens No. 667 Richmond & Westchester Counties.
Kings County Register's Office No. 2028.
New York County Register's Office No. 2019.
Bronx County Register's Office No. 2200.
My commission expires March 30, 1922.

I approve of the within bond and of the sufficiency of the surety thereon.

JNO. C. KNOX,
U. S. D. J.

91 *Præcipe.*

United States District Court for Southern District of New York.

In Bankruptcy.

No. 30396.

In the Matter of HUB CARPET COMPANY, Bankrupt.

To the clerk of the above-entitled court:

You are requested to certify a transcript (which we will prepare) of the record with the file marks thereon to be filed in the United States Circuit Court of Appeals for the Second Circuit pursuant to an appeal allowed in the above entitled cause and to include in such transcript a record of the following and no other papers or exhibits, to-wit:

1. Order to Show Cause dated October 19th, 1921, signed Learned Hand, U. S. D. J.; affidavit of Aaron Ratner annexed thereto, verified the 19th day of October, 1921, including Exhibit 1.

2. Affidavit of Wallace Benedict verified the 22nd day of October, 1921 with Exhibits A, B, C and D annexed thereto and affidavit of Seldon Bacon verified the 24th day of October, 1921 with Exhibit E annexed thereto submitted in opposition to the motion.

3. Affidavit of Aaron Ratner verified the 28th day of October, 1921, including Exhibit 2 annexed thereto submitted in opposition to said motion.

92 4. Affidavit of Selden Bacon verified the 31st day of October, 1921, submitted in rebuttal.

5. Opinion of Hon. Learned Hand dated November 14th, 1921.

6. Decree entered on decision dated November 19th, 1921.

7. Petition for appeal and allowance thereof by Hon. Learned Hand, United States District Judge, dated November 21st, 1921.

8. Appellant's assignment of errors.

9. Bond on appeal with notice of filing and admission of service thereof.

10. Citation on appeal with admission of service thereon.

Respectfully,

SELDEN BACON,
Attorney for Appellant.

Office and Post Office Address: 43 Exchange Place, Borough of Manhattan, New York City.

(Endorsed.)

Service of a copy of the within Præcipe is hereby admitted.
Dated, December 10, 1921.

LOUIS S. POSNER,
Attorney for Aaron Ratner.

Filed December 12 at 12:30 P. M., U. S. District Court, S. D. of N. Y.

93 *Stipulation.*

United States District Court for the Southern District of New York.

In the Matter of HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER.

It is hereby stipulated and agreed that the annexed transcript of record in the above entitled matter is a true copy of all the papers filed and proceedings had and entered in said cause and are true and correct transcripts of the originals and the whole thereof as they appear on file in the Clerk's office of the District Court of the United States, Southern District of N. Y.
Dated, New York, December 28th, 1921.

SELDEN BACON,
Attorney for Receiver as Appellant.
LOUIS S. POSNER,
Attorney for Appellee.

94 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

In the Matter of HUB CARPET CO.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 28th day of December, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-sixth.

[Seal of the District Court.]

ALEX. GILCHRIST, JR.,
Clerk.

94a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER, Appellee; WALLACE BENEDICT, as Receiver in Bankruptcy of Hub Carpet Company, Appellant.

It is hereby stipulated and agreed that, while Exhibit E of the affidavit of Selden Bacon printed at pages 44 to 58 of the record on appeal in this cause is a correct copy of the stenographer's minutes of the examination of Aaron Ratner under Section 21A, the stenographer's transcript of minutes contained the following errors which Mr. Ratner desired to correct in his testimony in accordance with this stipulation, and which the attorney for the Receiver agree should be made in such testimony prior to signature.

And it is further agreed that the above named court in considering this appeal may treat the record as corrected in accordance with this stipulation, and that arguments may be predicated in the above named court on the Exhibit as so corrected in accordance with this stipulation.

The corrections in question are as follows:

94b In line 6 of folio 135 of the printed record on appeal the words "in December" should be "on September."

In line 1 of folio 140 the word "lend" should be "borrow," and in line 3 thereof the word "mind" should be "want."

Lines 2 and 3 of folio 142 should be corrected to read as follows: "Then I should call it in but as long as I do not find it advisable in any way or manner nobody.'

In Line 9 of folio 145 figures "$16,000" should be "$15,000."

In line 1 of folio 147 the words "That same note became" should be stricken out.

In lines 8 and 9 of folio 148 the words "and made" should be stricken out and the word "making" substituted therefor.

In line 1 of folio 149 the words "notice of" should be inserted after the word "take."

In line 2 of folio 150 the word "account" should be stricken out and the words "list of accounts" inserted in lieu thereof.

In line 5 of folio 160 the word "bought" should be changed to "shipped."

In line 12 of folio 169 the words "use there themselves" should be stricken out and the words "say myself," inserted in lieu thereof.

These corrections are agreed to at the request of the appellee, Aaron Ratner.

Dated, January 6th, 1922.

SELDEN BACON,
Solicitor for Wallace Benedict, Receiver in Bankruptcy, Appellant.
LOUIS S. POSNER,
Solicitor for Aaron Ratner, Appellee.

94c [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. In the Matter of Hub Carpet Company, Bankrupt. Ex Parte Aaron Ratner, Appellee; Wallace Benedict, as Receiver in Bankruptcy of Hub Carpet Company, Appellant. Stipulation as to Record on Appeal. Selden Bacon, Solicitor for Appellant, 43 Exchange Place, New York City. Louis S. Posner, Solicitor for Appellee, 15 Broad Street, New York City.

95 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of HUB CARPET COMPANY, Bankrupt; Ex Parte AARON RATNER, Appellee.

Appeal from an order or decree of the District Court for the Southern District of New York ordering receiver of the bankrupt to account to petitioner, Aaron Ratner, for all sums received upon certain accounts and denying the receiver's motion to pay over to him certain sums theretofore received by Ratner.

Before Hough, Manton, & Mayer, Circuit Judges.

Hub Carpet Company, was what is sometimes called colloquially a family corporation with four officers and stockholders. One of these was Aaron Ratner, the Vice-President. His father Aaron Ratner was not connected in any manner with the corporation but wished to help his son. On May 23, 1921, the Board of Directors held a meeting at which the Treasurer reported that a representative of the well known house of W. & J. Sloane Co. had suggested the advisability of Hub Co. obtaining more money with which "to run the business" and that through Abner Ratner, he (the Treasurer) had arranged to borrow a sum not to exceed $30,000 from Aaron Ratner upon the notes of the company, secured by present and future accounts receivable. Following this report, a resolution was
96 duly adopted authorizing the borrowing on notes and the delivery as security of "an assignment to the said Aaron Ratner of the books of account of the company."

Under the same date an agreement was entered into between Hub Co. and Aaron Ratner, whereby Ratner bound himself to make loans from time to time up to $30,000, these loans to be evidenced by the notes of Hub Co.

Further, Hub Co. assigned and transferred as collateral security all accounts then and thereafter to become due in the ordinary course of business. Hub Co. agreed to keep Ratner fully advised of its financial condition and authorized him "to enforce this assignment at any time that in his judgment it may be for his interest to do so notwithstanding the time for the payment of the notes has not in fact accrued."

It is not disputed that it was understood that Hub Co. should go on collecting its receivables and using the proceeds thereof without accounting to Aaron Ratner until he so required.

Pursuant to the agreement, Hub Co. delivered to Aaron Ratner monthly a list of receivables, showing collections, changes in the accounts and new receivables, or, in brief, a statement of the situation as it currently stood. The last letter, i. e., that of September 23, 1921, transmitting the September list is typical of the routine between the parties. It read: "Enclosed find the September list of accounts receivable assigned to you in accordance with our agreement of May 23, 1921."

97 Up to September 17, 1921, Ratner had not asked and proceeds of the receivables. At that time, however, he became disturbed because of the pressure of creditors and demanded the protection of his agreement and it was agreed that he should receive "checks that would thereafter come in in connection with its (the Co.'s) accounts receivable". Thereafter, Ratner received the checks, trade acceptances and notes which came in from Hub Co.'s debtors who were mentioned on the lists. These receivables were turned over to Aaron Ratner "in precisely the form in which they were received."

It is this amount which the receiver demands and it is the difference between $30,000 and this sum of $11,581.78 with interest which Ratner demands from the receiver, the petition in bankruptcy against Hub Co. having been filed September 26, 1921.

Selden Bacon for receiver appellant.
Louis S. Posner for Aaron Ratner appellee.

MAYER, *Circuit Judge:*

There is nothing in this record to warrant even a suggestion of fraud. The loan by Ratner and the assignment by Hub Co. of the accounts receivable constituted a legitimate and business like transaction whereby a considerate father was willing to help his son and the latter's associates in maintaining what, at the time, seemed to be a hopeful business.

The questions involved, therefore, are solely questions of law. We shall speak of the receiver as a trustee in bankruptcy and as though the application of Ratner had been made after the appointment of a trustee in view of our recent decision in Matter of Max Mitchell, — F. R., —, filed January 1922.

98 The status and powers of a trustee under Section 47*a* of the Bankruptcy Act, as that section now reads since the amendment of 1910, were decisively dealt with in Bailey v. Baker Ice Machine Co., 239 U. S. 268, 275, 276. In that case, Baker Ice Machine Co. had made an agreement with Grant Brothers for the conditional sale of a machine, the title remaining in Baker Co. until the purchase price was fully paid and the machine being in the possession of Grant Brothers.

Under the recording law of Kansas, a contract of conditional sale is valid between the parties whether filed for record or not, but is void against a creditor of the vendee "who fastens a lien upon the

property by execution, attachment or like legal process before the contract is filed for record". The contract was made October 14, 1911 and filed for record May 15, 1912. On June 11, 1912, Grant Bros. filed their voluntary petition in bankruptcy and on the following day were adjudged bankrupts. At that time, the chattel which was the subject matter of the controversy was found in the possession of the bankrupts. Between October 14, 1911 and May 15, 1912, no creditor had "fastened a lien upon the property by execution, attachment or other legal process". It was contended that section 47*a*, clause 2 of the Bankrupcy Act, as amended in 1910, c. 412, Stat. 838, 840, gave a trustee the status of a creditor having such a lien. The court held, however, "That the trustee takes the status of such a creditor as of the time when the petition in bankruptcy is filed."

See also

In re Morris, 204 F. R. 770;
Matter of P. Jesse Matton—decided January 18, 1922.

99 On September 26, 1921, the date of filing of the bankruptcy petition, in the case at bar, there were no receivables upon which any creditor had "fastened a lien". On September 23, 1921, when the September list was delivered to Ratner pursuant to the agreement of May 23, 1921 that act was equivalent to the taking of possession in the case of a chattel or to the recording of a mortgage under a state statute.

There was nothing further nor better which could have been done by the parties to perfect Ratner's lien or to reduce to possession what the parties had called the "collateral security".

There was no way by which Hub Co. could physically deliver notes, checks, or other evidences of debt from customers which had not yet been received and the only practicable method of conferring title and possession was by the delivery of the list in compliance with the demand of September 17, as contemplated by the agreement of May 23.

Indeed, on this branch, the case is well within Union Trust Co. v. Bulkley, 150 F. R. 510.

Gregory v. Morris, 96 U. S. 619;
McCaffrey v. Woodin, 65 N. Y. 459, 463.

100 In Wilds v. Board of Education, 227 N. Y. 211, the court in distinguishing that case from Titusville Iron Co. v. City of New York, 207 N. Y. 203, stated that the "all important difference between the two cases is, however, the time of possession."

In view, therefore, of the fact that Ratner had title to the accounts receivable and possession thereof, as matter of law, prior to the filing of the bankruptcy petition, the sole remaining question is whether the agreement between Ratner and Hub Co. was inherently void because Hub Co. was permitted to reserve the right to use the proceeds of these receivables until and unless Ratner demanded that they should be turned over to him.

It is "to be borne constantly in mind that the state law determines the efficiency of acts and transactions to effect the transfer of title of the property involved."

Remington on Bankruptcy, Second Edition, Vol. II Secs. 1140 & 1275.
Sexton v. Kessler, 225 U. S. 90;
In re Doran, 154 F. R. 467.

In New York, accounts receivable are not "goods or chattels" (Lien Law sec. 230, Personal Property Law, sec. 360, Niles v. Matthusa, 162 N. Y. 546) and, therefore, do not come within the provisions of recording or filing acts.

There has grown up, however, the doctrine of reputed or ostensible ownership. This doctrine seems to have had its origin in Twyne's case, 3 Coke Rep. 80*b*, referred to in Robinson v. Elliott, 22 Wall. 513 and in sections 176 et seq. of Mr. Garrard Glenn's
101 thoughtful work on "The Rights and Remedies of Creditors respecting their Debtor's Property." The doctrine is thus stated by Mr. Glenn in section 173 of his book.

"The situation with which we will now deal is where a man, not the owner of the property, is held out as the owner under such circumstances as would be reasonably calculated to induce the extension of credit to him upon the faith of his apparent ownership. In such a case, when he becomes insolvent, the question is whether the true owner can assert his title to the property in question as against the persons who have become creditors of the apparent owner."

In Robinson v. Elliott, supra, a mortgage was executed which provided that the mortgagors "may remain in possession of said goods, wares, and merchandise, and may sell the same as heretofore and supply their places with other goods, and the goods substituted by purchase for those sold shall, upon being put into said store or any other store in said city where the same may be put for sale by said parties of the first part, be subjected to the lien of this mortgage."

The Supreme Court said:

"Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit by what they apparently own and possess, and this ownership and possession had existed without interruption for ten years. There was nothing to put creditors on their guard. On the contrary this long-continued possession and apparent ownership were well calculated to create confidence and disarm suspicion."

See also

Frelinghuysen v. Nugent, 36 F. R. 220;
Griswold v. Sheldon, 4 N. Y. 581, 590;
Stackhouse v. Holden, 66 App. Div. 423, at page 427.

But the cases to which this doctrine of reputed or ostensible ownership has been applied are those where the personal
102 property is visible.

The American doctrine of reputed ownership, does not, however, apply to choses in action. As Glenn puts the point: "It may be said that no one can be in the apparent ownership of a chose in action, because there is no possibility of an effective ostentation of ownership by means of possession."

It is, perhaps, going too far to say that men get credit only because of what they apparently own or that they never get credit because of the ownership of choses in action which may not be physically seen.

This distinction has developed historically, but a further reason for the exclusion of choses in action from the rule of reputed ownership is that courts in their decisions have been reflective of the course of business in the commercial world.

It is matter of common knowledge that the merchant utilizes his accounts receivable and other kinds of choses in action to keep his business liquid and everyone expects that he may sell or pledge such choses in action for that very purpose. On the other hand, it is ordinarily assumed that the goods and chattels in his place of business belong to him and may freely be dealt with by him.

It is mainly because of commercial usages and necessities that the courts have not included accounts receivable within the doctrine of ostensible ownership, but on the contrary have excluded them therefrom.

Stackhouse v. Holden, 66 App. Div. 423.

The case at bar does not turn upon any question as to the right of substituting security for that withdrawn which was one of
103 the questions in Sexton v. Kessler, 225 U. S. 90, nor on the question as to whether a later transaction was merely the consumation of an earlier agreement as in Chapman v. Hunt, 254 F. R. 768. Underlying these cases as well as Greey v. Dockendorff, 231 U. S. 513, is this principle of exclusion from the reputed ownership rule, which we apply to this case. As Mr. Justice Holmes points out in Greey v. Dockendorff, supra, "The rule of the English statutes as to reputed ownership may extend to debts growing due to the bankrupt in the course of his business but we have no such statute" nor on the facts in the case at bar was there (again to quote from Mr. Justice Holmes) "a moment when the goods (here the receivables) could have been attached."

The case nearest that at bar is Stackhouse v. Holden, supra, and, although the court was not unanimous, we think the opinion of Nash, J. ably stated the principles here applicable.

From the foregoing, it follows that the receiver (or trustee if since appointed) must account and pay over to Ratner any and all proceeds representing collections by the receiver or trustee of the debts set forth on the list of September 23, 1921 and on all prior lists up to an amount sufficient to pay the balance beyond $11,581.78 with appropriate interest. The decree below properly provided that the

bankrupt or its trustee execute a "formal assignment" to Aaron Ratner of the accounts not yet collected. We are not informed as to whether there were any accounts due Hub Co. not mentioned on these lists or arising between September 23rd and September
104 26th. If there were such, Ratner is not entitled to the same, because he took no steps to perfect his lien in respect thereof or to reduce such collateral security to possession.

The decree is affirmed with costs.

105 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of Hub Carpet Company. (Copy.) Opinion. Mayer, C. J.

106 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit held at the Court Rooms, in the Post Office Building, in the City of New York, on the 24th day of April, one thousand nine hundred and twenty two.

Present:

Hon. Charles M. Hough,
Hon. Martin T. Manton,
Hon. Julius M. Mayer,
Circuit Judges.

In the Matter of the HUB CARPET COMPANY, Bankrupt; WALLACE BENEDICT, as Receiver, etc., Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

C. M. H.
M. T. H.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Hub Carpet Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 24, 1922. William Parkin, Clerk.

107 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 107 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Matter of Hub Carpet Company, Bankrupt, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3rd day of May in the year of our Lord One Thousand Nine Hundred and twenty-two and of the Independnce of the said United States the One Hundred and forty-sixth.

[Seal of the United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

108 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit entitled In the matter of Hub Carpet Company, Bankrupt; Ex parte Aaron Ratner, appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court
109 of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twelfth day of June, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28,949. Supreme Court of the United States, October Term, 1921. No. 994. Wallace Benedict, as Receiver in Bankruptcy of the Hub Carpet Company, vs. Aaron Ratner. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 15, 1922. William Parkin, Clerk.

110 Supreme Court of the United States, October Term, 1921.

No. 994.

WALLACE BENEDICT, as Receiver in Bankruptcy of the Hub Carpet Company, Petitioner,

against

AARON RATNER, Respondent.

The Supreme Court of the United States having issued a writ of certiorari under date of June 12th, 1922, to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, directing and commanding them to send to the said Supreme Court the record and proceedings in this cause, which was a suit entitled in the said Circuit Court of Appeals "In the Matter of Hub Carpet Company, Bankrupt; ex-parte Aaron Ratner, Appellee",

It is hereby stipulated and agreed that the transcript of record in the said matter already on file in the office of the Clerk of the United States Supreme Court, filed with the petition for certiorari in this matter, may be taken as a return to the writ.

Dated, New York, June 14th, 1922.

SELDEN BACON,
Solicitor for Petitioner Wallace Benedict, as Receiver in Bankruptcy.
LOUIS S. POSNER,
Solicitor for Aaron Ratner, Respondent.

111 [Endorsed:] Supreme Court of the United States, October Term, 1921. No. 994. Wallace Benedict as Receiver in Bankruptcy of the Hub Carpet Company, Petitioner, against Aaron Ratner, Respondent. Stipulation. Selden Bacon, Solicitor for Petitioner, 43 Exchange Place, Borough of Manhattan, New York City.

112 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation

of counsel is hereunto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, June 15, 1922.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

113 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Wallace Benedict, as Receiver, etc. vs. Aaron Ratner. Return to Certiorari.

114 [Endorsed:] File No. 28,949. Supreme Court U. S., October Term, 1922. Term No. 400. Wallace Benedict, Receiver etc., Petitioner, vs. Aaron Ratner. Writ of certiorari and return. Filed June 17, 1922.